the army LAWYER

HEADQUARTERS, DEPARTMENT OF THE ARMY

Department of the Army Pamphlet No. 27-50-71
November 1978

TABLE OF CONTENTS

Remarks by the Honorable Clifford L. Alexander, Jr., Secretary of the Army, at the 1978 Judge Advocate General's Conference.

It is a great pleasure for me to be here this evening. It gives me the opportunity to tell you personally how favorably the work you have been doing is viewed by Army Headquarters. The provision of legal services is one of the Army's most necessary activities. It can be pointed to with great pride, and this is due largely to the work of the offices headed by our staff judge advocates. Your achievements deserve special recognition in light of the increasing scope of activities which have legal implications. (And while I will direct my remarks tonight principally to the staff judge advocates assembled here, what I will say applies in the main to other Army Lawyers as well.)

The Army has always required legal services. George Washington requested a judge advocate very shortly after assuming command of the Contenental Army in 1775. In those early days the judge advocate was primarily concerned with discipline in the ranks. This remains a major part of your work—about a third, I am told. But now your activities range from concerns over *environmental impacts* to new definitions of *constitutional rights*; from the intricacies of *procurement law* to new concepts of *personal privacy* and *freedom of information*. You bear the workload resulting from the *accelerated declaration of the rights of*

servicemen, which was one of the by-products of the war in Southeast Asia. You are charged with administering to *the increased demand for fairness*, which has made equality and social justice central factors in the design of Army personnel programs.

In all of these areas, and in numerous others I have not mentioned, you as staff judge advocates are called upon in your capacity as legal advisor to the commander. I look to the Army's commanders to make sound decisions. By identifying legal problems and participating in the formulation of legally acceptable decisions, you assist that commander in the exercise of command. That is a weighty responsibility. But I am reminded of the story of a British general near the end of the eighteenth century who, upon learning that his new assignment as Commander of a West Indian Island would require him to judge cases, sought the advice of Lord Mansfield. Chief Justice Mansfield remarked, "Nothing is more easy: only hear both sides patiently—consider what you think justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong."

It's hard to say whether Lord Mansfield intended that a judge or lawyer was better off relying on his intuition than on his reasoning or whether he was merely advising against the risk of exposing one's errors. Whatever the case, although that advice may have been sound for Lord Mansfield's time when black robes, white wigs and commanding rhetoric were a bit more awesome than today, the world, your world, has grown more complex. Too many of the *right* answers are *counterintuitive*. You lawyers must think harder; analyze better; leave him or her with the confidence that what you urge on him or her as a matter of law, makes good sense as a matter of fact. To achieve this, your recommendations must be highly practical. Your suggestions must be constructive. You must examine all available options. And it is essential to let your client know what his or her options are and how they stack up against one another. You must also use good judgment, which is really the addition of *human considerations* to the solution of a problem. You must be flexible and have in mind not only how a decision will be viewed within the military, but, where there are other audiences involved, how it will affect them.

I want to emphasize the last factor because to a greater extent than ever before, the Army lawyer is deeply involved in dealing with local and state civilian officials and with local citizenry. Such problems as land acquisition and use, labor peace, and responsibility for the provision of services, have placed the Army

The Judge Advocate General
Major General Wilton B. Persons, Jr.
The Assistant Judge Advocate General
Major General Lawrence H. Williams
Commandant, Judge Advocate General's School
Colonel Barney L. Brannen, Jr.
Editorial Board
Colonel David L. Minton
Lieutenant Colonel Victor G. McBride
Major Percival D. Park
Editor
Captain Frank G. Brunson, Jr.
Administrative Assistant
Ms. Helena Daidone

The Army Lawyer is published monthly by The Judge Advocate General's School. Articles represent the opinions of the authors and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, Charlottesville, Virginia, 22901. Because of space limitations, it is unlikely that articles longer than twelve typewritten pages can be published. If the article contains footnotes they should be typed on a separate sheet. Articles should follow *A Uniform System of Citation* (12th ed. 1976). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The subscription price is $9.00 a year, 80¢ a single copy, for domestic and APO addresses; $11.25 a year, $1.00 a single copy, for foreign addresses.

Issues may be cited as *The Army Lawyer*, [date], at [page number].

lawyer in the forefront of community relations. If the Army lawyer is not out there personally, he or she is guiding those who are. The impact of these relations is subtle and enormous. They shape public perceptions of the military, influence its treatment in the press, affect its credibility and its effectiveness.

Part of *your* effectiveness turns on your relationship with your client. Let me address a recurring problem. The commander is expected to make wise decisions, and you are to provide the legal underpinnings. From time to time your commander may find himself or herself at odds on a critical issue with a position being pressed by his superiors. It may involve legal judgments, and the Office of The Judge Advocate General may also be involved. What is your role? It seems to me that you have several responsibilities. Provided that you find yourself intellectually and ethically able to support the position of your commander, then, until a final decision is made, you should feel free to marshal the best possible argument in support of your commander's position. You owe the commander this as a member of his or her personal staff. Moreover, your defense of the commander's position benefits the decisional process—it enhances Army management's responsiveness to local needs. Finally, this may be essential to your own effectiveness, your commander must trust you and have the feeling that he or she may confide in you.

Nevertheless, there are constraints on your role. Principally, you must first advise the commander as to what you think he or she *ought* to do. In this process, you must bring to bear the ethics of the legal profession, the ethics of the military profession and your own personal code. Moreover, while you may marshal the facts in behalf of the commander's position, you must affirmatively make certain that all essential facts, stripped of obscuring or self-service ambiguities, are made clear to those people in higher authority who are also considering the problem. Of course, when a decision is made, either on a legal issue by the Office of The Judge Advocate General, or other issue by a higher command, your role changes. It then becomes one of assuring the most effective and efficient implementation of that decision, consistent with its spirit.

In any situation where loyalties and motives are arguably in conflict, lawyers must hold tenaciously to the tenets of our ethical code. A tarnished reputation is a special burden. Let us not find ourselves in the position of the lawyer who was trying a case against Abraham Lincoln. Lincoln was examining the members of the jury as to whether they knew the opposing lawyer. The judge reprimanded Lincoln for wasting time, pointing out that jurors who knew the lawyer could not be disqualified on those grounds. Lincoln's reply was, "No, your Honor, but I am afraid some of the gentlemen of the jury may *not* know him, which would place me at a disadvantage."

Our judge advocates must have reputations for integrity out of debt, not only to the legal profession, but to the officer corps as well. Integrity is among the Army's highest ideals and its importance has been dramatically manifested. Take, for example, the Corps of Engineers' civil works program. We have seen in headlines instances of other public agencies racked by the type of scandal which is bred where large disbursements of public funds are involved. The Army Corps of Engineers administers multi-million dollar programs in the construction field, one which always seems ripe for the mishandling of public trust, and yet the Corps does so without the slightest suggestion of impropriety. I attribute that to the integrity of Corps officials. The Corps has established a reputation, one which has not escaped the attention of foreign officials, who actively seek its supervision of projects overseas. It is a major asset of our foreign policy. The same can be said of our procurement commands.

Let me give another example, one which has day-to-day impact on the effectiveness of the Army. As you may suspect, the organization of the Army, structured as it is with a civilian leadership at the apex of a uniformed military hierarchy, creates potential for misunderstanding between senior military and civilian officials. The potential is there for a variety of reasons; for now, let us just say that it is there. My role as Secretary of the Army is to command that institution, and the discharge of

that role would be worlds different were it not for the candor and dedication of the uniformed military leadership, General Bernie Rogers and his staff. And, generally speaking, the officers with whom I deal shoot straight from the shoulder. They do not tell me what they think I want to hear. Instead, they tell me what they think, based upon their years of experience. This behavior tells me several things. It tells me that they care about the Army, and it tells me that they have a high degree of integrity. I am very pleased with the team effort we have developed at the Pentagon, and it is working because it is built upon a trust founded upon integrity.

There are countless other examples of officer integrity and its benefits. But there are from time-to-time, unfortunately, transgressions in this area. One of the things I expect from the officers of the Judge Advocate General Corps is that you labor to reduce these transgressions by timely advice, by personal example, by your determination, and by maintaining a good, thick skin.

There is another side to this. Because integrity is the Army's most compelling ideal, if not its finest product, you must, as the Army's lawyers, insure that this precious asset is not misused. On *rare* occasions I have heard it urged that a criticism not be made, or a question not be asked, because it would "challenge" an officer's "integrity." Now, to be sure, there are correct, civil and polite ways in which to pursue the critical inquiries which are the very essence of a good lawyer's professionalism. But integrity is a *command to be followed*; it is never a *defense to inquiry*. And "integrity" which cannot withstand inquiry is not integrity at all.

If you think about it, integrity in the Army is a form of moral discipline. In turn, the basic concept of discipline is elemental to the Army's function of deterring war by standing ready to fight war. One of the most difficult functions of your job is to find that formula, that recipe, which tempers civilian concepts of justice by the need to foster discipline. Too little discipline undermines the military function. But so does too much, and it provides fodder for civilian criticism. Military law must be responsive to the dilemma inherent in our system: that is, our society's idea of justice usually elevates individual discretion over obedience, and discipline may appear inconsistent with that version of justice. You are the Army's moderators, the intermediators, between the so-called "separate society" of the military and the civil society to which it is ultimately responsive.

Finally, let me tell you where I stand in the most recent edition of the controversy about the role and value of lawyers in government. I am often puzzled and saddened by the criticism I hear. I have had a lot of governmental experience, and I find lawyers as a group to be extraordinarily hard working, constructive, and effective. It is they who often grapple with the very *hardest problems* in the most *electric circumstances*. Often it is their peculiar strength, their adherence to principle under stress, which generates criticism. It is generally undeserved in my view.

You have my respect and my admiration. I am dependent on you and I thank you for the courtesy you have extended to me this evening.

Recent Developments in the Wake of *United States v. Booker*

Captain John S. Cooke, Circuit Judge, 5th Judicial Circuit

Military practitioners have had nearly a year to ponder the decision of the United States Court of Military Appeals[1] in *United States v. Booker*[2] and to grapple with the many issues it raised. The ramifications of *Booker* were sweeping; the application of *Booker* was uncertain. Much of the confusion and consternation created by *Booker* continues today.[3] Answers to some of the questions *Booker* raised have been provided, but the permanency of even some of these answers is debatable.

This article will examine several of the solutions provided recently to some of the ques-

tions raised or spun off by the original *Booker* decision. A few of these solutions have been provided by CMA itself, while others have come from lower courts or other agencies. *Booker* is a case which defies concise analysis and comment. Therefore, only the following areas, in which there has been some development since *Booker* will be discussed:

1. The minor military offenses limitation on summary courts-martial[4] jurisdiction is no more.

2. Does *Booker* establish substantive requirements for a valid summary court-martial or nonjudicial punishment,[5] or are its sanctions collateral only?

3. What requirements must be met for records of SCM and NJP to be admissible in courts-martial?

a. To what extent is *Booker* to be applied retroactively?

b. What is a sufficient showing of rights/waiver under *Booker?*

c. How may the rights/waiver be proved?

d. Must defense counsel sign the waiver forms?

This article is not intended to be a critique of the *Booker* decision, or of its doctrinal or philosophical underpinnings. Rather, it is an update on recent developments spawned by the *Booker* decision.

A brief recapitulation of the original *Booker* decision is in order at this point. *Booker* held that prior summary courts-martial convictions, in which proceedings the servicemember neither waived nor had representation by counsel, could not be admitted against an accused in subsequent courts-martial to escalate the maximum punishment under the Manual for Courts-Martial.[6] This holding rested largely upon the Supreme Court's assertion in *Middendorf v. Henry*[7] that summary courts-martial are not criminal prosecutions within the meaning of the sixth amendment. The remainder of *Booker* purports to interpret and apply *Middendorf's* analysis of military justice. In the process of this exposition, CMA discussed standards for procedures in administering SCM and NJP, and the effect of such procedures on the admissibility of records of these proceedings in subsequent trials by court-martial. The court also suggested a restriction on the jurisdiction of summary courts-martial. While all of this was dicta, its prescriptive nature gave it a significance which demanded attention.

Some of the issues raised by *Booker* must now be examined.

1. The Minor Military Offenses Limitation on Summary Courts-Martial Jurisdiction.

"[W]e find it necessary to limit summary courts-martial to disciplinary actions concerned solely with minor military offenses unknown in civilian society."[8] So wrote Chief Judge Fletcher for the majority in the original *Booker* decision. CMA granted a petition for reconsideration of this aspect of the original opinion,[9] and recently released its new decision on this issue.[10] The majority rejected the limitation established by the original *Booker* opinion. The only limitation upon the subject matter jurisdiction of summary courts-martial (aside from the jurisdictional restraints applying to all courts-martial[11]) is the prohibition in Article 20 against trying capital cases in summary courts-martial. The majority's reversal as to this piece of dictum had no effect on the disposition of Private Booker's case.[12]

Chief Judge Fletcher, who wrote the original *Booker* opinion, dissented from this modification of it. He perceives potential for abuse in permitting SCM to try relatively serious offenses. Evidently he feels that since the justification for deviating from the constitutional norm in such trials is the unique military requirement for discipline, then only offenses directly disciplinary in nature may be tried by summary courts-martial. In this regard, the Chief Judge did indicate that he would modify his original position to the extent that he would permit civilian type offenses with special impact in the military (e.g. barracks larceny) to be tried by summary courts-martial. In essence, this would be an ad hoc test similar to

the one used in *O'Callahan*[13] cases, albeit more stringent in its application. The majority refused to place even this kind of a limit on summary court-martial jurisdiction.

2. Does *Booker* Prescribe Substantive Requirements for a Valid SCM or NJP, or Are Its Sanctions Collateral Only?

Booker's discussion of the procedural prerequisites for administering SCM and NJP is prefaced with the following remarks: "[W]e must nevertheless reexamine these hearings [SCM and NJP] to ensure compliance with the command of the Supreme Court that they measure up to the essentials of due process and fair treatment."[14] This language suggests that the safeguards *Booker* established were essential procedures for the exercise of SCM or NJP jurisdiction. However, the majority discussed the effect of noncompliance with these procedures solely in terms of the inadmissibility of records of SCM or NJP in subsequent courts-martial. The implication of this treatment was that *Booker* established an exclusionary rule protecting a servicemember against collateral uses of SCM and NJP not administered in accordance with *Booker's* prescriptions, but that the underlying validity of such SCM and NJP was not affected by noncompliance with *Booker*.[15] A DA Message[16] on *Booker*, which is discussed below,[17] took the latter view.

Whatever CMA intended when it decided *Booker* originally, it now seems likely that it will treat *Booker* solely as an exclusionary rule. *United States v. Cannon*[18] hints at this when it states that *Booker* applies only to *cases* tried after the original *Booker* decision. By focusing on *Booker's* application of an evidentiary rule in cases, rather than its operation as a procedural safeguard in SCM and NJP proceedings, the court reinforces the notion that an exclusionary rule is the lynchpin of the *Booker* machinery.

On a different plane, CMA's recent action in *Stewart v. Stephens*[19] apparently establishes that CMA's power to regulate NJP proceedings is limited to indirect methods, such as *Booker's* exclusionary rule. In *Stewart*, CMA dismissed a petition for extraordinary relief challenging an Article 15 proceeding. CMA's conclusion that is has no jurisdiction to review such proceedings curtails any direct supervisory role CMA might have over NJP. Thus, the result in *Stewart* appears to restrict *Booker's* effect to that of an exclusionary rule in courts-martial.[20]

3. What Requirements Must Be Met For Records of SCM and NJP to be Admissible in Courts-Martial?

Actually, this question breaks down into several questions. The first two questions, which are interrelated due to the treatment they have received, involve *Booker's* retroactive application, and the standards required for a valid waiver. A third question involves the mechanics of proving a valid waiver. A fourth spin off question is whether defense counsel must sign *Booker* waiver forms.

a. To what extent is *Booker* to be applied retroactively?

Because thousands of SCM and NJP's are administered yearly, and because records of such proceedings are administered in a high percentage of courts-martial, an important question has been the timing of *Booker's* application. CMA supplied at least a partial answer to this question in *United States v. Cannon*,[21] a per curiam opinion, which held that *Booker's* prohibition against using counselless SCM convictions to effectuate the Manual's escalator clause applies only to cases tried after the original *Booker* decision was issued on 11 October 1977. The court indicated that a contrary result " . . . could adversely affect the trial of any case which not only involved the escalation clause, but any court-martial where records of Article 15 and 20 proceedings, without the requisite advice of counsel, were introduced during the extenuation and mitigation portion of the trial."[22] Thus, none of *Booker's* exclusionary rules apply to cases tried after 11 October 1977.

The Army Court of Military Review[24] has decided several cases in which it interpreted the timing of *Booker's* application. The ACMR anticipated *Cannon's* result in *United States v.*

Beckman,[25] but it has gone further, and limited *Booker's* effect in several other ways as well. Two decisions by one panel of the ACMR have held that *Booker's* exclusionary rules apply only to SCM and NJP conducted after *Booker*. In *United States v. DeOliveira*[26] the ACMR held that *Booker's* standards of admissibility apply only to SCM tried more than thirty days after the original *Booker* decision. The same panel previously ruled, as an alternative basis for its holding in *United States v. Washington*[27] that *Booker's* requirements do not apply to NJP imposed before *Booker* was decided.[28] Another panel of the ACMR has held, in *United States v. Taylor*,[29] that *Booker's* discussion of NJP is dicta, and is, therefore, not binding precedent. Hence, under this view, *Booker* does not apply to NJP even today.

United States v. Cannon was decided after these ACMR decision, however, and its language gives rise to some doubts about their durability. *Cannon* suggests that CMA is concerned with the time of the trial at which the documents are offered, rather than with the date of the proceedings underlying those documents.[30] *Cannon* also indicates that CMA assumes that the safeguards prescribed in *Booker* already apply to NJP as well as SCM.[31] *Booker* itself seemed to comtemplate the immediate efficacy of its prescriptions in both SCM and NJP proceedings.[32] This erodes *Taylor's* analytical foundation. Still, none of these cases has been overturned,[33] and, arguably, they can be distinguished from *Cannon*, since Cannon did not specifically address the issues in any of them.

b. What is a sufficient showing of rights/ waiver under *Booker?*

One of the most difficult questions raised by *Booker*, and complicated by the opinion's somewhat confusing discussion of the issue, is what must be documented in order to establish a valid acceptance of SCM or NJP. Unfortunately, there has been relatively little case law on this subject. As discussed above, cases have tended to concentrate on whether *Booker* applies at all, rather than on the manner of its application. Thus, under *Taylor* and *DeOliveira*, the standards of admissibility for NJP and SCM records were not changed by *Booker*, except for SCM's tried after 10 November 1977. Because those cases rest on questionable premises, it seems likely that the focus will soon shift to what standards for admissibility must be met under *Booker*. As scarce as it is, there is some important authority in this area.

A review of *Booker's* somewhat confusing guidance on this issue is in order before turning to subsequent developments. *Booker's* holding operates to exclude, for purposes of the escalator clause, SCM convictions in which the accused was not provided counsel, and did not waive representation by counsel during the trial. Thus, the record must reflect that an accused had, or waived, counsel at his SCM for the SCM conviction to effectuate the escalator clause. *Booker* did not step there, however. Dicta in *Booker* further established that neither SCM or NJP records may be admitted for any purpose unless it can be shown that the accused made a knowing and intelligent choice to accept either forum. Unfortunately the court's discussion of what is necessary for admissibility of these records is less than clear.

During the pertinent portion of the *Booker* decision, CMA described three overlapping requirements for administering SCM and NJP.

1. The servicemember must be made aware of the choices available to him or her (i.e., accept SCM or NJP, or demand trial by a higher level court-martial) and of the "substantive and procedural rights at the given hearing, punishment limitations, and potential uses of the imposition of discipline through such proceedings in a later criminal prosecution."[34]

2. The servicemenber "must be told of his right to confer with an independent counsel before he opts"[35] for SCM or NJP.

3. The accused's acceptance of either SCM or NJP jurisdiction must be in writing and must establish that it is knowing, intelligent, and voluntary.

Although they seem simple, certain aspects of the court's discussion of these requirements generated substantial uncertainty. Construed

broadly, the court seemed to establish as a prerequisite for admissibility of SCM or NJP a very elaborate rights waiver form. Yet the court avoided prescribing specific provisions for such documentation, and in its (somewhat confusing[36]) discussion of the application of these requirements in Private Booker's case the court merely said that more than "a check in a box"[37] was necessary.[38] Thus, how detailed must the waiver documentation be?

By DA Message, the Criminal Law Division, OTJAG suggested sample waiver forms shortly after *Booker* was issued.[39] The format suggested by Criminal Law Division takes a middle position. The forms do not reiterate in detail all of the rights, ramifications, and recourses which *Booker* suggests must be discussed with a servicemember offered NJP or a SCM. The forms describe in conclusory terms, the rights and choices available to the servicemember, emphasizing the right to counsel and memorialization of the servicemember's availment of that right. Unless *Booker* is interpreted in a very rigid manner, these forms are probably adequate.[40]

Although CMA has yet to review the question of adequacy of rights/waivers since *Booker*, the ACMR has dealt with the issue. In most of the cases in which this issue has arisen, the ACMR has not determined whether an adequate waiver under *Booker* exists, because it has held that *Booker* did not apply.[41] Recently, however, one panel has decided, in *United States v. Washington*[42] and *United States v. Gordon*[43] that the record of NJP itself (apparently DA Form 2627) establishes a sufficient waiver under *Booker*.[44] In theory, this approach might impel a more careful scrutiny of the 2627 to insure compliance with *Booker;* as a practical matter, however, the result of these opinions is to leave the determination of admissibility of NJP in Army courts-martial in substantially the same posture as before *Booker*. The ACMR has yet to address what waivers must be shown for admission of SCM, but to the extent that *Washington* and *Gordon* remain good law, similar standards would seem to apply to SCM too.

As discussed above,[45] there are indications that CMA will disagree with those ACMR opinions which have found *Booker* inapplicable to SCM or NJP on the basis of when the SCM was held, or to NJP at all. The approach of the majority in *Gordon* may stand a better chance for success. While DA Form 2627 does not contain an elaborate description of all of the factors discussed in *Booker*, it makes clear that the servicemember has a choice as to acceptance and whether to exercise some important procedural rights (e.g., whether to have a spokesman) and, significantly, that the servicemember has a right to the advice of counsel in making his or her decision.[46] Clearly, the DA Form 2627 involves more than a single check in a box. While it would be prudent to supplement DA Form 2627 with more complete documentation of the rights waiver procedure, if *Booker* is not read too broadly, the *Gordon* rationale may survive.[47]

In any event, and most importantly, *at present* and until CMA says otherwise, the authority from the ACMR indicates that properly executed DA Forms 2627 are admissible. *Gordon, Taylor,* and *Washington* may all be cited by trial counsel as establishing admissibility of such records. *DeOliveira* can be similarly cited in offering SCM's dating from before 10 November 1977. Admissibility will then depend upon the philosophy of the trial judge and how strictly or broadly he construes *Booker* and *Cannon* and their application to these decisions. A judge would not be free to disregard these ACMR decisions unless they were clearly erroneous or in conflict with CMA's decisions. As discussed earlier, however, the ACMR's decisions in *Taylor* and *DeOliveira* (and that portion of *Washington* which holds that *Booker* does not apply to NJP administered before 11 October 1977) may have been contradicted by CMA's language in *Cannon. Gordon* on the other hand, is less subject to such an attack; while CMA may ultimately require more for a valid waiver,[48] it is difficult to reject *Gordon* as precedent on that account. It can be expected that military judges will differ in their treatment of these cases, just as they seem to have treated *Booker* itself in a variety of ways. Still,

until clearer guidance is forthcoming from CMA, a trial counsel might think twice before offering records of SCM or NJP with less than a thorough waiver form. To offer such documents is to risk planting a hard won case in a field which CMA may plow under before long.

c. How may the necessary waivers be proved?

Assuming that there is agreement as to what must be proved for a sufficient waiver to be established, the ancillary question immediately arises: how may the waiver be proved? *Booker* asserts that the waiver "must be in writing."[49] Obviously, then, the simplest, and safest mode of proof would be a valid waiver form or written record of waiver included in the record of SCM or NJP. *Booker* also provides for proof of waiver by other means where no adequate written record of waiver is offered. CMA said, "If the exhibit does not affirmatively establish a valid waiver, the trial judge must conduct an inquiry *on the record* to establish the necessary information."[50] Ordinarily such an inquiry would entail calling the commander who imposed NJP or the officer of the SCM in question to testify as to the advice given the accused and his responses to that advice. Others who actually witnessed these events might also be able to provide sufficient information to determine whether a valid waiver was made.

Two other possible sources of the necessary information come to mind. One is the accused himself and the other is the counsel who advised him. The ACMR has held that it is improper for the military judge to compel the accused to provide the necessary information,[51] since this is clearly a violation of the accused's right to remain silent, which he retains during sentencing proceedings.[52] Whether counsel who advised the accused as to his SCM or NJP can be called to testify on this question is unclear. There appears to be no ethical basis on which counsel could refuse to so testify, as long as no privileged information were to be revealed.[53] Such a procedure does not present the best possible image of military justice however.

d. Must defense counsel sign the waiver forms?

Actually, this is two questions: (1) is counsel's signature necessary for a valid waiver under *Booker?;* and (2) is defense counsel obliged to sign waiver forms over his or her objections. The answer to the first question is apparently no. The answer to the second question, in the Army, is a resounding yes.

Nothing in *Booker* requires the counsel who advises the servicemember on SCM or NJP proceedings to sign the form. Indeed, it is difficult to see what the defense counsel's signature adds, from an admissibility standpoint, to an otherwise adequate form signed by the servicemember. While counsel's signature on the form may, in rare cases, serve to rebut an accused's challenge to the admissibility of NJP or SCM, it will normally be no more than gild on the lily.

Nevertheless, the waiver forms suggested by OTJAG provide for the counsel who advises the servicemember about NJP or SCM to sign the form along with the servicemember. Many defense counsel objected to signing the forms and claimed ethical bases for refusing to do so. Such an objection became the subject of an opinion by Criminal Law Division, OTJAG, in an inquiry as to whether counsel may be lawfully ordered to sign the form.[54] Unfortunately for defense counsel, their visceral objections were not rooted in any of the provisions of the Code of Professional Responsibility. Consequently, the OTJAG opinion declared that counsel can be ordered to sign the forms, although it suggested that confrontations should be avoided and advanced several alternative ways of dealing with the situation.[55] In any event, defense counsel who refuse to sign the form does so at his or her peril.

SUMMARY AND CONCLUSION

There are now a few answers to some of the many questions which *Booker* raised when it was issued last year. CMA has established that *Booker* does not apply to cases tried before it was decided, and has retracted the minor military offenses limitation on summary court-martial jurisdiction, thus settling these issues. OTJAG has established that defense counsel

may be required to sign the *Booker* waiver forms, although there is as yet no case holding that counsel's signature is necessary for a valid waiver. Some of the other solutions are of more uncertain durability. Of greatest concern to counsel is the effect which *Booker* has on admissibility of SCM and NJP in courts-martial. While the safest approach is to offer only records of such proceedings which contain a thorough description of rights, options, and waiver (at least as detailed as the forms suggested by OTJAG) there is presently case authority indicating that a trial counsel can get by with far less. ACMR decisions have held that *Booker* substantially affects only the admissibility of SCM tried after 11 November 1977, and NJP not at all. Most important perhaps is the *Gordon* decision which holds that a properly executed DA Form 2627 is admissible under *Booker* regardless of when the punishment was imposed. CMA has yet to approve any of the rationales which led to these results, however, and language in *Cannon* may imply that CMA will not accept some of these ACMR positions.

The dust has only begun to settle in the wake of the tumult stirred by *Booker*. In light of *Booker's* own complexity, and CMA's subsequent silence on many of its aspects, the future is still clouded. Military practitioners can only tread cautiously and study the guideposts we do have with care, until the road becomes clearer.

Footnotes

[1] Hereinafter referred to as "CMA" in text.

[2] United States v. Booker, 5 M.J. 238 (C.M.A.); *partially reconsidered* 5 M.J. 246 (C.M.A.); *originally published* at 3 M.J. 443 (C.M.A.) as *modified at* 4 M.J. 95 (C.M.A. 1977).

[3] *Booker*, 5 M.J. 238, has been severely criticized. *See, e.g.* United States v. Nordstrom, 5 M.J. 528 (N.C.M.R. 1978); *Who Is Out of Step?* The Army Lawyer, June 1978, at 1, 5.

[4] *See* Uniform Code of Military Justice, art. 20 [hereinafter cited as U.C.M.J.], 10 U.S.C. § 820 (1968). Summary courts-martial are also hereinafter referred to as ACM.

[5] *See* U.C.M.J. art 15, 10 U.S.C. § 815 (1968). Nonjudicial punishments are also hereinafter referred to as NJP or Article 15's.

[6] Manual for Courts-Martial, United States, 1969 (rev. ed.), para. 127c [hereinafter cited as MCM, 1969].

[7] Middendorf v. Henry, 425 U.S. 25 (1976). *Middendorf* held that servicemembers have no right to counsel in SCM under either the fifth or sixth amendments.

[8] United States v. Booker, 5 M.J. 238, 242 (C.M.A. 1977).

[9] United States v. Booker, 4 M.J. 137 (C.M.A. 1977).

[10] United States v. Booker, 5 M.J. 246 (C.M.A. 1978).

[11] *See* Relford v. Commandant, 401 U.S. 355 (1971); O'Callahan v. Parker, 395 U.S. 258 (1969); United States v. Hedlund, 2 M.J. 11 (C.M.A. 1976)

[12] C.M.A.'s reconsideration of this issue served to highlight how far C.M.A. strayed in *Booker*, 5 M.J. 246, from the narrow confines of the case before it. The issue had no bearing on the outcome of PVT Booker's case. Hence, in reconsidering this issue C.M.A. was reconsidering a rule not a ruling.

[13] O'Callahan v. Parker, 395 U.S. 258 (1969).

[14] United States v. Booker, 5 M.J. 238, 242-3 (C.M.A. 1977).

[15] This view is bolstered by the language in the original opinion which tended to perceive military justice as being divided into two spheres. One sphere is a justice sphere consisting of special and general courts-martial and is primarily the responsibility of judicial officials. The other sphere is a discipline sphere consisting of summary courts-martial and nonjudicial punishment and is primarily the responsibility of command. Given this theoretical framework, C.M.A's interest in SCM and NJP may focus on the impact the records of these proceedings have on the integrity of judicial proceedings, rather than in a reformation of "disciplinary" proceedings themselves.

[16] DA Message DAJA/CL 1977/2656, 1 November 1977. *Cf.* SECNAV Message 012307Z, December 1977, ALNAV 073/77.

[17] *See* notes 39 and 40 and accompanying text, *infra*.

[18] United States v. Cannon, 5 M.J. 198 (C.M.A. 1978).

[19] Stewart v. Stephens, 5 M.J. 220 (C.M.A 1978).

[20] Arguably, summary courts-martial might be treated differently. *Stewart*, 5 M.J. 198, does not apply to them of course. Under McPhail v. United States, 1 M.J. 457 (C.M.A. 1976) an argument can be made that C.M.A. has supervisory power over SCM such as would permit C.M.A. to make special rules for that forum. (Of course, decisional law, including rules promulgated thereby, emanating from the court which affect military justice generally is applicable to SCM). However, *Stewart*, 5 M.J. 198, has erected at least one barrier limiting the apparent boundlessness of jurisdictional

domain declared in *McPhail*, 1 M.J. 457. Moreover, in a concurring opinion in *Stewart*, 5 M.J. 198, Judge Cook, *McPhail's* author, repudiated *McPhail* and its expansive view of C.M.A.'s jurisdiction. Whatever view C.M.A. takes regarding its supervisory power over SCM as such, it seems unlikely that it intended the *Booker*, 5 M.J. 238, requirements to have different effects on SCM and NJP. The court's action in *Stewart*, therefore, probably means that *Booker* establishes only an exclusionary rule as to both SCM and NJP.

[21] United States v. Cannon, 5 M.J. 198 (C.M.A. 1978).

[22] *Id.*

[23] The date of the original *Booker*, 5 M.J. 238, decision was 11 October 1977. It should be noted that if *Booker's* prescriptions were deemed to affect the substantive validity of SCM and NJP (*see* discussion of this issue at notes 14-20 and accompanying text *supra*) there would then be a question of *Booker's* retroactive application to such proceedings. Even if *Booker* were held to have established requirements affecting the basic validity of those proceedings, it is virtually unthinkable that it would be applied retroactively to the tens of thousands of SCM and NJP which preceded it. *See* Stovall v. Denno, 388 U.S. 293 (1967); United States v. Jackson, 3 M.J. 101 (C.M.A. 1977). *But, cf.* Loper v. Beto, 405 U.S. 473 (1972); Kitchens v. Smith, 491 U.S. 847 (1971); Burgett v. Texas, 309 U.S. 109 (1967); Doughty v. Maxwell, 376 U.S. 202 (1964 establishing retroactivity of right to counsel in felonies, declared in Gideon v. Wainwright, 372 U.S. 335 (1963).

[24] Hereinafter referred to as ACMR.

[25] United States v. Beckman, 4 M.J. 814 (ACMR 1978). The Navy Court of Military Review also anticipated *Cannon*, 5 M.J. 198, in United States v. Harrell, 5 M.J. 604 (NCMR 1978). Contrary to some of the decisions of the ACMR, discussed below, the NCMR in *Harrell* held that *Booker* does apply to records of NJP offered in courts-martial tried subsequent to Booker.

[26] United States v. DeOliveira, 5 M.J. 623 (ACMR 1978).

[27] United States v. Washington, 5 M.J. 615 (ACMR 1978).

[28] The court did not explain why it established a thirty day notice period for SCM in *DeOliveira*, M.J. 623, but did not provide for one in *Washington*, 5 M.J. 615. *Washington* was decided only one week before *DeOliveira* The reason probably lies in the brevity of the court's treatment of what was one of three alternative grounds for affirmance in *Washington*. If the issue was more squarely addressed, it is likely that the majority would recognize an identical notice period in the NJP situation. 29.

[29] United States v. Taylor, 5 M.J. 669 (ACMR 1978).

[30] Indeed if *Booker*, 5 M.J. 238, viewed as establishing an exclusionary rule to protect the integrity of judicial proceedings, rather than concerning itself primarily with regulating SCM and NJP (*see* n.15 *supra*), then it would seem to apply equally to all SCM and NJP regardless of when imposed.

[31] *See* the language quoted in text at note 22, *supra*.

[32] Thus, the majority said in *Booker*, 5 M.J. 238, at 243, "Absent Compliance with this [advice of right to consult with Counsel] proviso, evidence of the imposition of punishment under either [Article 15 or 20] is inadmissible in any subsequent court-martial."

[33] A petition for review has been filed in United States v. Washington, 5 M.J. 178 (C.M.A 1978). As of this writing it is not known what action has been taken on the petition or whether petitions for review have been filed in *DeOliveira*, 5 M.J. 623, and *Taylor*, 5 M.J. 615.

[34] United States v. Booker, 5 M.J. 238, 243 (C.M.A. 1977).

[35] *Id.*

[36] Despite the apparent simplicity of the three standards, *Booker*, 5 M.J. 238, leaves unanswered a number of questions. Thus, although requirement number two calls for advising the servicemember of the right to consult with counsel, at another point the court asserts that only a legally trained person can effectively explain the rights and options described in requirement number one. Does this mean that a servicemember who refuses to consult a lawyer cannot intelligently accept NJP or SCM? Such a result is anomalous (an accused can waive his or her right to counsel at trial, after all; *see* MCM, 1969 (rev. ed.) para 48a; Faretta v. California, 422 U.S. 896 (1975)) and likely to cause unnecessary mischief. It seems unlikely that C.M.A. intended that a servicemember could not waive the right to consult with counsel in these circumstances.

Furthermore, while the majority undertook to describe in some detail (in requirement number one) the nature of the information a servicemember should be given in order to decide whether or not to accept SCM or NJP, it is not clear whether this discussion is intended as an aid to counsel who give advice in this area, or if its purpose is to establish the litany which must be incorporated on the waiver documentation. Probably it is a little bit of both, but divining the precise mixture is not easy. Thus, some issues are so fundamental (e.g. that SM has a choice whether to accept NJP or SCM, or to demand trial by court-martial, and a right to consult with counsel) that they must be specifically described in the waiver documentation. Other things (e.g. punishment limitations, ramifications of decision) can presumably be left to the counsel whom the SM consults, without need of elaboration in the waiver form. The OTJAG waiver forms (*see* notes 39 and 40 and accompanying text, *infra*) basically adopt this compromise position.

Further diluting, and confusing *Booker's* apparently strict declaration of requirements is the fact that after announcing that a waiver "must" be in writing, the

court proceeds to discuss the possibility of proving a waiver without such written documentation. *See also* n.37, *infra*.

[37] United States v. Booker, 5 M.J. 238, 244 (C.M.A. 1977).

[38] Adding to the difficulties in interpreting all of this is the majority's apparent confusion of two types of waiver. The primary issue in *Booker*. 5 M.J. 238, turns on whether a summary court-martial conviction, in which PVT Booker was not represented by counsel at trial, could be used to trigger the escalator clause. While *Middendorf*, 425 U.S. 25, established the validity of those summary courts-martial, C.M.A. held that *Middendorf* "recharacterized" those SCM into something other than convictions. In discussing the effect of all of its discussions in *Booker* on PVT Booker's case, C.M.A. began by saying that the record failed to establish "a valid waiver of counsel . . . in either of the prior summary courts-martial in question." The court next stated:

> We believe that the Supreme Court's longstanding position of requiring that every reasonable presumption against waiver of the assistance of counsel be indulged [citation omitted] mandates that the record affirmatively demonstrate a valid *personal* waiver by the individual of his right to trial in a criminal proceeding rather than having us infer or assume one solely on the basis of a single check in a box on a prepared form.

Id., (footnotes omitted; emphasis in original). Thus, *in a single sentence* the court shifts from waiver of counsel *at* the SCM, to waiver of the right to refuse trial by SCM. It is, therefore, not clear whether PVT Booker received relief because of defects in his acceptance of SCM jurisdiction, or because he had no counsel at his SCM trials. The majority's emphasis on the right to counsel (the issue in *Middendorf*, 425 U.S. 25, and, hence, the underlying concern throughout *Booker*, 5 M.J. 238, despite the wide ranging nature of the opinion) probably indicates that the key concern in a valid rights waiver form is insuring that the servicemember is afforded the opportunity to consult with counsel before making the acceptance decision as to SCM or NJP.

[39] DA Message, DAJA/CL 1977/2656, 1 November 1977.

[40] As indicated above (*see* n. 38 *supra*), affording the servicemember the right to consult with counsel is probably paramount. The DA Message forms satisfy this requirement. A question may arise whether these forms are official records and, hence, admissible as such. Army Reg. No. 27-10, Military Justice (C17, 15 August 1977), para. 3-15 appears to answer that question affirmatively. "When punishment is imposed under Article 15, *all action taken*, including notification, acknowledgements, imposition, appeal, action on appeal or any other action will be recorded . . . . (Emphasis added.)

[41] See notes 25-33 and accompanying text, *supra*.

[42] United States v. Washington, 5 M.J. 615 (ACMR 1978) alternative basis for holding). The other basis for affirming on the *Booker*, 5 M.J. 238, issue were that *Booker* does not operate to exclude Article 15's administered before it was decided (*see* discussion of this issue at notes 27-33 and accompanying text, *supra*), and that even if admission of the NJP were error here, no prejudice flowed from it.

[43] United States v. Gordon, 5 M.J. 653 (ACMR 1978). *See also* United States v. Provance, 4 M.J. 819, 820-1 (ACMR 1978) (Clausen, C.J., concurring in result).

[44] In *Washington*, 5 M.J. 615, and *Gordon*, 5 M.J. 653, Judge De Ford joined in the majority in affirming admissibility of NJP, but he did so by applying the rationale of *Taylor*, 5 M.J. 669.

[45] See notes 30-32 and accompanying text, *supra*.

[46] The DA Form 2627 does indicate to the servicemember that he/she has a choice whether to accept NJP and, importantly, that he/she may seek advice of counsel before making a decision. The form does not provide for showing whether the accused exercised this right, but it is submitted that the service-member's signature underneath this advice gives rise to an inference that he or she has been advised by counsel, or affirmatively waived such right. The defense would be free to attack this inference, of course.

[47] It should be noted that the Air Force Court of Military Review reached a conclusion similar to the ACMR's in *Gordon*, 5 M.J. 653, in United States v. Huff, 4 M.J. 731 (AFCMR 1978). In *Huff* the AFCMR held that the forms used (apparently Air Force NJP forms) established a satisfactory waiver under *Booker*, 5 M.J. 238. Obviously, forms elaborately tailored to *Booker* were not used because *Huff* was tried before *Booker* was decided. CMA has denied a petition for review of the *Huff* decision. *Huff*, 5 M.J. 212. While this is of some significance (*Huff* is, after all, new good law in the Air Force) its importance is diminished by two factors. First, CMA has stated that petition denials are of no precedential value. United States v. Mahan, 1 M.J. 303, 307, n.9 (C.M.A 1976). Second, as indicated, *Huff* was tried on 7 June 1977, five months before *Booker* was decided. Therefore, to the extent that a rationale for the petition denial exists, it is at least as likely that the *Cannon*, 5 M.J. 198, decision explains the action as it is that CMA was affirming the AFCMR's reasoning in *Huff*.

CMA has denied numerous other petitions raising *Booker* issues, but again, because of the factors discussed above, it is unclear what, if any, significance to attach to this.

[48] Petitions for review have been filed in United States v. Gordon, 5 M.J. 209 (CMA 1978) and United States v. Washington, 5 M.J. 178 (CMA 1978). A review of Daily

Journal entries through 21 June 1978 did not disclose whether CMA has taken any action on these petitions, nor, as indicated above (*see* n. 33, *supra*), whether petitions have been filed in *DeOliveira*, 5 M.J. 623, or *Taylor*, 5 M.J. 615.

[49] United States v. Booker, 5 M.J. 238, 243 (CMA 1977).

[50] *Id.*, at 244 (emphasis in original).

[51] United States v. Gordon, 5 M.J. 653 (ACMR 1978). It is easy to see how some military judges might have been misled on this issue by *Booker*, 5 M.J. 238, itself. When Chief Judge Fletcher said that the military judge is obliged to conduct an inquiry on the record to establish the necessary information for a waiver, he cited two earlier opinions, United States v. Davis, 3 M.J. 430 (CMA 1977) and United States v. Rivas, 3 M.J. 282, 289 (CMA 1977) (Fletcher, C.J. concurring). In both of these cases, the trial judge was deemed to be obliged to inquire of the accused and defense counsel regarding their desires and intentions surrounding counsel's representation of the accused in that case. In addition, in discussing the personal waiver which must be shown for SCM to be admissible in *Booker*, Chief Judge Fletcher stated the following in a footnote: "We note that the form in question was not signed by the accused, nor did he ever acknowledge or adopt the purported waiver on the record *of this trial.*" United States v. Booker, 5 M.J. 238, 244, n. 25 (CMA 1977) (emphasis added). Despite the potential for misunderstanding of these comments (a potential which has apparently been realized), it is unlikely that CMA intended to imply more than that the trial judge has an obligation to insure that an adequate foundation is established in the record for the SCM or NJP to be admissible. *Cf.* United States v. Heflin, 1 M.J. 131 (CMA 1975).

[52] *See* MCM, 1969, para. 53h; *see also* McGautha v. California, 402 U.S. 183 (1971).

[53] *See* text accompanying n.54, *infra*.

[54] *Criminal Law Section*, The Army Lawyer, May 1978 at 36.

[55] *Id.*, at 37. The alternatives mentioned are "relief for dereliction, admonition or reprimand, and a reflection of willful failure on their OER's." It is respectfully submitted that these alternatives also carry a risk of confrontation and a potential for damaging the image of military justice, and should, therefore, only be used in extreme situations.

The author agrees that no ethical violation occurs when counsel signs the form. The following observations may be in order. While there is no ethical violation in signing the form, counsel's visceral objections are understandable. At bottom, counsel feel they are doing something which in no way benefits the client and may in fact injure him or her. In this regard, the opinion's analogy to counsel's assistance at trial or during a *Care* (United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969) inquiry is inapposite. In those instances counsel's presence and active participation are part of the service rendered to the client; counsel during a guilty plea is not mere window dressing. Counsel is there to assist the client effectuate a choice, presumably made in his or her own best interests, to plead guilty. Contrarily, in the waiver form situation, counsel has already rendered the assistance; a signature on the form constitutes a memorialization of it. Although objections to this procedures are often couched in terms of a violation of the attorney-client privilege (the main topic of discussion in the OTJAG opinion), the real concern is that counsel is not acting in the best interests of the client and is, in a sense, acting as a witness against the client. (*See*, ABA Code of Professional Responsibility, (1977), EC 5-1, 5-9, 5-10, DR 5-101, DR 5-102, DR 5-197(B).)

These provisions do not provide a basis for counsel's objections, however. Counsel's professional judgment is not being controlled. The prohibition on lawyer as witness provisions in the ABA Code appear to be concerned primarily with avoiding placing a lawyer in the conflicting roles of advocate and counsel at the same time. Certainly, there is no blanket prohibition against lawyers acting against or being witnesses against present or former clients, although privileged information must not be disclosed even in such situations.

While it is difficult to analogize the *Booker* waiver signature situation to other functions of counsel, perhaps it can best be compared to an attack on counsel's adequacy. In such a situation counsel is free to reveal even that privileged information necessary to protect his or her reputation (ABA Code of Professional Responsibility, DR 4-101(c)(4)). Such revelation is, of course, not in the accused's best interests ordinarily. In the *Booker* waiver situation, counsel is asked to rebut, before the fact, a possible denial by the servicemember that he or she has seen counsel and received certain advice from him. While normally it would be preferable to wait until such a denial occurs, the circumstances here justify the present procedure. These are: (1) no privileged information is revealed; the basic information and advice described in *Booker* and given by counsel is not privileged. *See* ABA Code of Professional Responsibility, DR 4-101(A); (2) the basic advice prescribed by *Booker* must be given in all cases, so consequently, it may be viewed as a statement as to the nature of legal services rendered to the client (*see* ABA Code of Professional Responsibility, DR 5-101(B)(3)); and (3) the time which records of NJP and SCM are kept, the purposes for which they are used, and the mobility and geographical diffusion of the services justify making a record of the event when it occurs, to avoid subsequent expense and disruption for the government and individuals concerned.

14

CID and the JA in the Field

Office of the Staff Judge Advocate, US Army Criminal Investigation Command

Successful investigation, processing of charges and prosecution of Army felony cases depend a great deal upon early and continuous interface between judge advocates and CID special agents at the local level. Without mutual understanding and appreciation between lawyers and criminal investigators, efforts of both will lead in most cases to less than desired results. It's a common saying that the better the lawyer knows the client, the better that client can be served. The purpose of this article, then, is to give a brief description of one of the judge advocate's biggest clients, the United States Army Criminal Investigation Command (USACIDC)—better known as the CID.

The US Army Criminal Investigation Command was established as a separate Major Army Command on 17 September 1971. It provides centralized criminal investigative support to Headquarters, Department of the Army, and to Army commanders worldwide. To provide this support, USACIDC is organized into a Command Headquarters, five Region Headquarters, a separate District Office for Washington, DC, and three criminal investigation laboratories. Each Region is assigned a specific geographic area of responsibility. Over 90 field elements, districts, field offices, resident agencies and branch offices are also assigned geographic areas of responsibility within their respective regions.

CID agents in the field depend primarily upon the supporting JA's in the development of criminal investigative leads and the preparation of investigative reports. There are eight JA's and one civilian attorney/advisor assigned to the command itself. Each region headquarters has a judge advocate assigned with the primary mission of providing administrative legal support. In addition to the functions associated with helping the command perform its mission within legal constraints, the region judge advocate (RJA) also serves as a liaison between local JA personnel and CID agents on current subjects of sensitivity, e.g., The Army Privacy Program as it relates to CID records, the Army WIMEA (Wiretap, Investigative Monitoring, and Eavesdrop Activities) policy and crime prevention surveys. In short, the RJA serves as the region commander's in-house legal counsel.

By Army Regulation commanders are required to insure that criminal incidents/allegations in the Army affecting or involving persons subject to the UCMJ, civilian employees of the Department of Defense (in connection with their assigned duties), Government property under Army jurisdiction, or incidents occurring in areas under Army control are reported to the military police or security police. The military police in turn refer the criminal information to the appropriate investigative agency. USACIDC bears the responsibility within the Army for the investigation of most serious felonies in cases of Army interest. See, for example, Appendix A, AR 195–2 which lists those felony offenses normally investigated by CID special agents.

CID investigative efforts are directed first toward the development of facts to prove or disprove the occurrence of an alleged offense, and secondly, to identify the perpetrator(s) of the offense. For CID reporting purposes, a "subject" is a person concerning whom probable cause exists to believe that that person committed the offense. Obviously, the standard of "probable cause to believe" is not as great as the standard of "beyond a reasonable doubt to convict," and reviewing JA's should not use the latter standard in evaluating subject and founded offense determinations in CID reports of investigation (ROI). Once an investigative report is finalized with judge advocate review, the case is considered "closed". In cases where Government trial counsel require further investigative effort before trial of charges by court-martial, the local CID office may be reluctant to commit limited manpower (CID) resources further on a case considered "closed".

Accordingly, trial counsel may be advised to obtain additional statements through the efforts of other than CID agents. This potential problem may be alleviated by judge advocates exerting greater "legal effort" in the review of draft USACIDC reports of investigation prior to the agent's preparation of the report "in final". Also, careful and early review of the ROI by the prosecuting JA would result in fewer "surprises" in his preparation for trial. In the review of ROIs see, for example, the CID "checklist" developed for the local JA in Chapter 3, CID Regulation 195–1.

Some JA's may not appreciate how limited (and fully employed) CID investigative resources are. Of the approximately 2000 persons in USACIDC, only 1000 of those are criminal investigators (warrant or enlisted). On any given day only about 50% of the CID investigators are "working cases on the street." During FY 77, 665 CID agents completed over 30,900 reports of investigation, and the three Army crime laboratories provided forensic support in 21,074 cases. Every JA, whether he be the SJA, trial counsel or military judge, should help in keeping every CID agent "on the street" as much as possible and not waiting long periods in witness rooms awaiting their turn to testify or to be interviewed.

By regulation CID agents do not work *for* the local commander, the provost marshal, or the staff judge advocates. They are located near the command to *support*, as much as possible, that commander and his staff. This Army investigative resource works to the benefit of all parties involved in the criminal justice process. Defense Counsel should be alert to the CID mission "to prove *or* disprove an alleged offense." Contrary to popular belief, it is not the mission of CID to put people in jail—trial counsel, judges, juries and convening authorities do that. The mission of CID is to develop facts on criminal offenses that can be used by the appropriate Army authorities. When CID does respond to requests by defense counsel for further development of investigative leads, there can be no confidential relationship between the CID agent and the defense counsel. If pursuit of leads provided by the defense results in evidence adverse to the defense, it will be provided to the Government in the same way as evidence clearing the defendent. Obviously, there will not be many occasions when defense counsel will seek CID assistance, but defense counsel should not refuse to utilize the services and expertise of CID when the assistance would benefit their client. It is much better for all parties that the accused (and innocent) soldier "win" the case before trial with CID investigative assistance, than become involved with court-martial proceedings leading to an "obvious acquittal." Again, keep in mind that because of manpower and administrative constraints, CID special agents cannot interview every possible source of information, and every statement made to the agents cannot be reduced to writing. Hopefully, good judgment, investigative expertise, and close coordination with supporting JA's (both government and defense) will provide a complete and responsive CID report in every case.

Two unique investigative techniques utilized by CID are the polygraph and electronic surveillance. While CID has responsibility for DA polygraph activities, the Assistant Chief of Staff for Intelligence (ACSI) currently has proponency for investigative electronic surveillance. There should be no great mystery about CID polygraph activities. AR 195–6 states, for example, that defense counsel and suspects/subjects may request a polygraph for purposes of exculpation, although any information gained by the Government polygraph examiner is not privileged. Polygraph examinations will only be run up to the time of arraignment unless otherwise authorized by the military judge. Although defense counsel will normally not be permitted in the actual examination room, two-way mirrors and a microphone (with the examinee's consent) permit counsel's close monitoring of the examination. Counsel may submit proposed questions to the polygraph examiner, and the examiner will review with the examinee and defense counsel all the questions which will be asked during the examination. If a defense request for polygraph is denied, the denial may be appealed to HQUSACIDC.

The Army policy for WIMEA (Wiretap, Investigative Monitoring and Eavesdrop Activities), once understood, will be received by most JA's in the field with incredulity, primarily because of many of the DOD/DA policy and procedural constraints on the utilization of WIMEA not found in statute or case law. Consider, for example, the consensual monitoring provisions of applicable Army guidance. In 1972, the Attorney General of the United States recognized that so long as at least one of the parties to a conversation consents to monitoring/recording (i.e., consensual eavesdropping or monitoring), there was no statutory prohibition against such monitoring. However, the Attorney General advised that one-party consensual monitoring would require the approval of the Attorney General; in emergency circumstances, the Secretary of the Army was authorized to approve such monitoring on an interim basis. Although the Attorney General limited his comments to criminal investigative activities, the Army made the restrictions on WIMEA applicable to all DA personnel (military and civilian) for whatever purpose the intercept "activities" are conducted. In essence, authority to conduct a consensual eavesdrop (at least one party will not be aware of the monitoring/recording), must be sought in the same way authority is sought to conduct nonconsensual wiretap (where none of the parties conversing have consented to the monitoring/recording). This policy leads to strange results. Counsel who record conversations with clients/witnesses without their consent or the required approval from the Secretary of the Army and higher authority may well have violated Army WIMEA policy. The CID RJA or the SJA, USACIDC, can provide upon request further guidance on WIMEA and CID policies to the field JA.

One area of continuing concern to Army commanders and judge advocates are fraudulent claims against the US Government. Should claims officers believe that a claim may be fraudulent, CID investigative support may be requested. First, however, JA claims officers should determine whether an Army investigative report has been prepared on the incident. Determinations on the allocation of investigative responsibility between the military police and CID agents are found in AR 190-30 and AR 195-2, and review of these provisions should reveal which agency would have the responsibility for preparation of an investigative report on the incident—e.g., an auto accident (MP), barracks larceny under $250 in value (MP), or house breaking (CID). Polygraph, if deemed appropriate by the CID may be of particular assistance in these cases. During 1976, polygraph examinations contributed to the recovery of stolen property or savings to the government in revealing false claims in the amount of $656,316.00. This represents an obvious cost saving to the taxpayer and conceivably could be increased as more claims judge advocates take advantage of CID assistance.

As most JA's in the field are aware, the most routine form of contact with CID is "JAG coordination" by the CID agent in case finalization. Unfortunately, like any human endeavor failures of communication do occur—e.g., perhaps the CID agent did not ask the "right" questions, or the JA did not provide legal opinions consistent with CID policies (e.g., listing of subjects based upon probable cause). Too often the JA in the field concludes a case is founded only if he believes the offender can be prosecuted before court-martial. Also a number of incidents have occurred recently where a similar standard was utilized in concluding that there was a lack of "Army interest" and that there should be no CID investigative effort in a case simply because court-martial jurisdiction appeared to be lacking. CID is *not* necessarily concerned whether a case would, or even could, be prosecuted (except to the extent poor CID investigative effort is indicated). The normal parameters of cases of Army interest are spelled out in AR 195-2 and CIDR 195-1; in a number of cases CID agents are the only responsive resource available to obtain those facts which a local commander must have to make a command decision.

All CID reports of investigation (ROIs) are filed in an (USACIDC) Army central records repository in Baltimore, MD; those that iden-

tify a "subject" are indexed in the Defense Central Investigation Index (DCII). Several important policies must be remembered. This command is required to provide a complete and legally sufficient report of investigation for all criminal offenses which are of Army interest within its investigative authority/ responsibility, and investigated by this command. Although the Army requires complete reports often on criminal offenses beyond its authority to prosecute, a legal review of the report is required whenever a subject is listed. As stated above, CIDR 195–1 provides a "checklist" for JA coordination with which all supporting JA's should be familiar. For example, advice on whether an offense is "founded" should not be limited to the offense on which the special agent is seeking advice, but rather the JA should include advice on any other offense substantiated by the facts. Also, a bad (illegal) search does not mean that an offense was not committed (founded); it merely means that evidence so seized is not admissible in any subsequent judicial proceeding. Obviously an "offense" cannot be founded if the violation is only administrative (nonpunitive) in nature, and a civilian subject cannot be listed for a violation of the UCMJ. The CID special agent will need the assistance of the field JA in determining applicable criminal law whenever an unusual offense occurs or a civilian suspect is identified.

If judge advocates, as professionals, see that CID is doing something wrong or in a substandard manner, it is incumbent upon them to step forward and assist in correcting the problem. The Commander, USACIDC, is encouraging his own professionals—the CID special agents, to seek closer contact and continuing coordination with the servicing JA. Please be responsive. Better investigative effort can only result in investigative facts more responsive to the needs of the local commander, his staff and the Army.

Formal requests for access to or amendment of CID records under the Freedom of Information or Privacy Acts are referred by CID field elements to the headquarters in Falls Church, Virginia. Headquarters, USACIDC (SJA) receives several requests monthly seeking amendment of USACIDC records. Although CID records are exempt from amendment under the Privacy Act of 1974, the Commander has provided that such records will be reviewed and evaluated under current USACIDC standards for materiality, completeness and accuracy. Those CID records retrieved from the Army crime records repository for this purpose will be evaluated under current standards, even though some older CID records were prepared as long ago as during World War II.

Another area of Privacy Act interest concerns release of personal information to third parties. By necessity, USACIDC ROI's are disseminated within DA to personnel with a "need to know". In cases involving release of CID records for claims or civil litigation purposes, HQUSACIDC and TJAG telephonic coordination is normally all that is required for authorized release. Thus far the criminal or civil sanctions in the Privacy Act have *not* been imposed for unauthorized release outside DOD of personal information in CID records.

The brief observations above are intended to reintroduce the field judge advocate to CID and to reinforce the close relationship that must exist between judge advocates and CID special agents. As in any interrelationship, it is a simple matter to end up at cross purposes—primarily because of the failure to communicate effectively with one another. If judge advocates in the field appreciate the fact that the CID represents an Army resource upon which judge advocates may call for assistance and to which they may provide responsive and complete advice upon request, then the work product of both will improve based on the resultant "team effort."

18

Spinning Straw from Gold—The A.S.B.C.A. Expands Jurisdiction

Major Stephen Eisenberg, 26th Advanced Class, TJAGSA *

Jurisdiction is the blood by which juridical entities are given life. The concept has been defined in many ways, but in one case has been simply described as the ". . .power to decide [a] case. . . .[1] The scope of jurisdiction of the Armed Services Board of Contract Appeals (ASBCA) was defined by the Supreme Court in the case of *Utah Construction and Mining Company v. United States.*[2] In the decision the Court reiterated the breadth of authority of the A.S.B.C.A. In order for the Board to take cognizance of a claim there had to be present in a government procurement contract both a "disputes clause"[3] which provided a forum in the administrative body and a specific remedy granting clause which provided relief.[4]

Distinguishing the scope of jurisdiction delineated by the *Utah* Court, it has been opined that the jurisdictional basis for claims by the government is more extensive than that of contractors. Specifically, a claim by the United States does not have to be predicated on a specific remedy granting clause.[5] Notwithstanding this position, the jurisdictional basis available to contractors may have expanded since the A.S.B.C.A. decision in *Spasors Electronics Corporation.*[6] *Spasors* stands for the proposition that the Board may declare all or part of a contract unconscionable under the provisions of Section 2-302 of the Uniform Commercial Code (U.C.C.) and thereby refuse to enforce any such portion of the contract whether or not a remedy granting clause exists. A proliferation of cases following *Spasors* supported by academic comment has carved out a jurisdictional exception to *Utah* which favors contractors.[7] Remedial action has been imposed or considered by the board in *Spasors* and its progeny in derogation of the most elemental considerations of its jurisdiction—lack of a specific provision within the contract providing a vehicle for relief and the fact that the Board has no equitable remedial power.[8]

The purpose of this analysis is to familiarize government counsel with an area of jurisdiction which is ripe for exploitation in the course of contractor appeals. The following paragraphs will provide a brief exposition concerning the applicability of the Uniform Commercial Code to government contracting; an evaluation of the leading cases applying Section 2-302 of the U.C.C. in the resolution of disputes at the boards of contract appeals; and a recommended course of action to counter appellate allegations that a contract should not be enforced by reason of unconscionability.

In order to comprehend the nature of the jurisdictional anomaly created by the Board, it is first necessary to have an understanding of the foundation which supports the application of the U.C.C. to government contracts. The A.S.B.C.A. first relied on the Uniform Commercial Code in its decision in *Reeves Soundcraft Corp.*[10] The Board held that, ". . .the Code govern[ed] as reflecting the best in modern decision and discussion . . ." with regard to contract law. Almost two years later in *United States v. Wegematic*[11] the United States Court of Appeals for the Second Circuit similarly adopted the U.C.C. as a source of federal law when no applicable contract provision or other federal law governed the case. The court stated that, ". . .[w]hen the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States."[12]

A number of significant reasons exist which enhance reliance by federal adjuticative bodies on the U.C.C. Perhaps the primary rationale is that the Code has been adopted as law in all states except Louisiana, as well as in the District of Columbia and the Virgin Islands. This fact creates the advantages of lessening the potential of conflict between state and federal

law and increasing the opportunity for similar interpretation of contract questions by courts and boards.[13] Another reason for reliance on the Code is the fact that it encompasses, ". . .the best in modern decision and discussion. . ."[14] presently available in the field of commercial law. Clearly, it would be quite difficult, if not impossible, for federal decision making bodies to improve on a code which has evolved over a period of decades.[15] Finally, it is substantially cheaper in cost efficiency terms for courts and boards to rely on the U.C.C. and its interpretive cases in rendering decisions rather than fully develop new rationale to predicate action.[16]

The Code nevertheless is limited in its coverage. It does not pertain to every facet of government contracting. For example, the U.C.C. has no application to contracts for services, but is applicable to sales of goods in accordance with the provisions of Article Two. When a question arises which may lend itself to resolution by reference to the U.C.C., the boards will not look to this body of law for guidance until it has been determined that there is no other federal precedent available.[17] "Since the U.C.C. in the context of Government-prime contractor disputes is a creature of judicial interpretation rather than congressional enactment, it must yield whenever there is a statute, an agency regulation, a contract provision, or a paramount federal purpose or interest with which it clashes."[18] The Code does not enjoy plenary usage even in those instances where application is proper. The provisions of the U.C.C. may be properly applied by the boards of contract appeals in aid of their jurisdiction and hence, are relied on more often than not in the course of interpreting contracts.

Here then is the nub of the problem. Although the code is a viable, interpretive aid in certain situations, in and of itself it provides no legally cognizable remedy granting courses of action for the resolution of government contract disputes by boards of contract appeals.

Section 2–302 is quite clear and unequivocal in its mandate. It simply states:

UNCONSCIONABLE CONTRACT OR CLAUSE

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

The area of concern becomes readily apparent. In most instances of procurement contracting there is a significant difference in bargaining power between the United States and the potential government contractor. More often than not a contract of adhesion comes into existence,[19] that is, an agreement which is offered by the government on a "take-it-or-leave-it" basis. Another salient aspect inherent to this type of contracting arises in carrying out the terms and conditions of the contract. The contractor often will acquiesce to the directions and desires of the government's agent, the contracting officer, whether it believes such to be fair or not. The foregoing characteristics make Section 2–302 a viable weapon with which to attack the contract.

The term "unconscionable" is defined by Webster's Dictionary as, "lying outside the limits of what is reasonable or acceptable: shockingly unfair, harsh, or unjust: OUTRAGEOUS. . . ."[20] Professor Corbin has characterized unconscionable provisions as being, ". . .so extreme as to appear unconscionable according to the mores and business practices of the time and place."[21] The Official Comment to Section 2–302 has setforth the basic test of unconscionability as, ". . .whether, in the light of the general commercial background and the commercial needs of the par-

ticular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." One commentator has suggested that the application of Section 2–302 on behalf of an aggrieved contractor may be appropriate if the appellant can demonstrate it has ". . .been the victim of Govt (sic) action which was unfair, oppressive, overreaching, exploitive, or grossly one-sided—but which did not go so far as to constitute fraud or economic duress. . . ."[22]

As noted before, Section 2–302 was first relied on by a board of contract appeals to support one facet of the decision in the case of *Spasors Electronics Corporation*.[23] Spasors was awarded a contract to produce radar altimeter warning sets. Due to numerous delays caused by both the government and the contractor, originally agreed on delivery schedules were cancelled. Prior to establishing a new schedule, one of Spasors prime subcontractors defaulted. Since there was no other manufacturer available to produce the part supplied by the subcontractor, the appellant decided to build the item itself. This decision was made notwithstanding the fact that considerable lead time would be necessary due to the difficulty of the task. The government, with full knowledge of the problems facing the contractor, unilaterally set a new delivery schedule which could not reasonably be met based on the circumstances confronting Spasors. The appellant thereafter agreed to the new schedule which it later was unable to meet. As a result of its failure to deliver on time, liquidated damages were deducted from amounts due to the contractor pursuant to a clause in the contract.

On appeal Spasors presented three arguments concerning the propriety of the 'new' delivery schedule. The first two theories advanced to overturn the assessment of damages were premised on excusability and economic duress. Both were rejected out of hand. The A.S.B.C.A. was amenable to the third argument and found the government unreasonable in setting the new schedule. The Board held that the action taken to secure Spasors' concurrence with the new schedule was, ". . .at least overreaching, if it was not coercive. The conversations were not negotiations looking toward real agreement. Such an agreement could only have been designed to preclude Spasors' right to appeal. . . ."[24] Citing Section 2–302 of the Code, the Board found the agreement to be unconscionable and unenforceable.

The holding by the A.S.B.C.A. poses more questions and problems than it solves. At the outset, the Board did not rely on a remedy granting clause which vested it with the authority and power upon which it purported to act. On the other hand, the Board functioned as a court of equity, something it had decided quite sometime before was outside the purview of its power.[25] Finally, the remedial power afforded by Section 2–302 specifically devolves on courts, not boards of contract appeals.[26]

In contrast to Spasors, the N.A.S.A. B.C.A. decided *American Standard, Inc.*[27] some three years later reaching an opposite conclusion. In this case the appellant had a two year contract to provide personal services for N.A.S.A. The agreement contained an option for a third year of services which was exercised by the government. During the course of the last year the contractor operated at a loss due to a restriction in the original contract's overhead ceiling rates, although appellant provided increased services. American Standard attempted to modify the contract while continuing to perform based on the government's assertion that by being the incumbent it would be in a better position to secure award of a follow-on contract. During the third year the contract was declared illegal and the contractor sought to recover amounts it lost.

In urging a favorable decision on behalf of the contractor, appellant's counsel urged the proposition that, ". . .the application of the ceiling on overhead provision was a part of [the] agreement, but it was not effectuated and 'the lack of effectuation under the circumstances gave rise to an unconscionable, and therefore unenforceable penalty provision. . . .' "[28] The Board rejected the argument. In doing so it stated that ". . .the Board's authority rests on the disputes clause

and the specific provisions the contract gives it to make equitable adjustments. A Board is not per se a court of equity and, while Boards try to do equity, they are limited in the terms of the contract. To carry out counsel's argument to the ultimate conclusion, a Board would have authority to determine, that if a consideration was unfair to a contractor it could decide the consideration was a penalty and unenforceable, or if a clause of the contract was unconscionable it could determine it was unenforceable. This, we believe is beyond the authority of a Board of Contract Appeals."[29]

The serious nature of the problem created by the expansion of jurisdiction as propounded by the A.S.B.C.A. in *Spasors* should not be taken lightly by government attorneys. A line of cases has arisen which has nurtured the development and acceptance of a cause of action premised on unconscionability without jurisdictional authority. The cases fall into three distinct categories: those which explicitly adopt Section 2–302 as the rationale for the holding,[30] those which consider the applicability of Section 2–302 but reject it because the facts in the case are found not to be unconscionable,[31] and those which rely on Section 2–302 as a "secondary" basis for reaching a conclusion in the course of interpreting the contract.[32] The use of the unconscionability clause before the boards has been further fostered by contractor's counsel in legal publications.[33] Hence, attorneys representing the interests of the government must be sensitive to the broad ramifications involved in permitting appellants to advance the proposition of unconscionability to the boards of contract appeals.

The government's defensive posture has two protective positions. At the forefront is a motion to dismiss for lack of jurisdiction. As a practical matter, if this defense is directed against one of the numerous predicates for a particular allegation, the result probably will be that the board will not favorably entertain the motion. The second position is to attempt to limit the scope of the board's action with regard to the allegation. This can be accomplished by underscoring the fact that the A.S.B.C.A.'s authority is limited by the terms of its charter. Paragraph 5 states, "When in the consideration of an appeal it appears that a claim is involved which is not cognizable under the terms of the contract, the Board may, insofar as the evidence permits, make findings of fact with respect to such claim without expressing an opinion on the question of liability."[34] The result of this situation would be to place the onus on the aggrieved contractor to continue litigating in a court of competent jurisdiction.

As a final thought counsel must recognize that not all allegations couched in terms of unconscionability are per se doomed to failure. There are instances where an argument posited in terms of Section 2–302 may have a proper basis. Exemplifying these situations are questions of excessive liquidated damages where a clause is available to support the relief requested. In one case a contractor was to provide janitorial services for an Air Force Base. After failing to provide 2.4% of the contracted functions in one building, the appellant was assessed 2% of the billing rate (i.e., $1,206 was levied on a portion of the contract with $1,080). The Board found the assessment to be unconscionable as it represented a penalty instead of realistic liquidated damages.[35] In another case a contract was interpreted in one manner versus another so as not to bring about an unconscionable result.[36] In *REDM Corporation*, the contracting officer agreed to an increase in an option price. The government's agent understood that the contractor interpreted such change to negate a contract provision which would have allowed the government to pay a lower cost. Nevertheless, the government took the cheaper price. In awarding additional compensation, the Board held that to enforce the clause under the circumstances would bring about an unconscionable result.[37]

Although contract appeals boards have addressed the question of relief in the context of "unconscionability" the above analysis is useful to explain why they either grant or refuse to grant redress. The essence of the problem then is, "has the adjudicative board found no contract clause upon which to reply or case law to support its decision and hence, equitable doctrines of accord and satisfaction, compromise,

waiver and estoppel have been invoked to achieve an equitable result?" The A.S.B.C.A. appears ready to apply the U.C.C. concept to any clause that would work an injustice.[38] The opposite view is simply that if there is no remedy granting clause in the contract upon which to redress the alleged wrong, any grant of relief would reform the instrument and is therefore, outside the scope of authority of boards of contract appeals.[39]

FOOTNOTES

*The author wishes to express his sincerest appreciation for the guidance and assistance provided in the preparation of this comment by LTC Robert N. Nutt and MAJ Gary L. Hopkins, Procurement Law Division, TJAGSA.

[1] Industrial Addition Ass'n v. Comm'r of Internal Revenue, 323 U.S. 310, 313 (1945).

[2] Utah Construction and Mining Company v. United States, 384 U.S. 394 (1966).

[3] *See, e.g.*, Armed Services Procurement Regulation (ASPR), Sections 7-103.12 and 7-602.6 (1976 ed.)

[4] Utah Construction and Mining Company v. United States, 384 U.S. 394, 405 (1966).

[5] *See* Harrington and Richardson, Inc., A.S.B.C.A. no. 9389, 30 May 1972, 72-2 B.C.A. para. 9507, 14 G.C. §396, 16 October 1972. *See also* National Bag Corp. G.S.B.C.A. No. 4331, 20 July 1977, 77-2 B.C.A. para. 2,663.

[6] Spasors Electronics Corp., Nos. 12,877 & 12,936 (A.S.B.C.A., 28 Jan. 1970), 70-1 B.C.A. para 8119.

[7] Briefing Papers, no. 75-3 (Shedd, Unconscionability in Contracts).

[8] Prestex, Inc., No. 6572 (A.S.B.C.A., 30 Jan. 1961), 61-1 B.C.A. para. 2937.

[9] *See generally application of the Uniform Commercial Code to Federal Government Contracts: Doing Business on Business Terms*, 16 WM AND MARY L. REV. 395 (1974).

[10] Express and implied warranty provisions were considered in a dispute over whether the goods provided were in conformity to the government's needs. Reeves Soundcraft Corp., Nos. 9030 & 9130 (A.S.B.C.A., 30 June 1964), B1964 B.C.A. para. 4317.

[11] The code provision concerning the defense of excusability was applied where a contractor failed to deliver a computer the government had ordered. 360 F.2d 674 (2d Cir. 1966).

[12] *Id.* at 676.

[13] Gaede and Bynum, *Federal Procurement Contracts—Dispute Resolution and the Developing Federal Common Law*, 27 ALA. L. REV. 1, 47 (1975).

[14] Reeves Soundcraft Corp., Nos. 9030 & 9130 (A.S.B.C.A., 30 June 1964), 1964 B.C.A. para. 4317 at 20,877.

[15] Gaede and Bynum, *Federal Procurement Contracts—Dispute Resolution and the Developing Federal Common Law*, 27 ALA. L. REV. 1, 48 (1975).

[16] *Id.*

[17] *See* Meeks Transfer Company, Inc., No. 11819 (A.S.B.C.A., 4 June 1968), 68-1 B.C.A. para. 7063.

[18] Gaede and Bynum, *Federal Procurement Contracts Dispute Resolution and the Developing Federal Common Law*, 27 ALA. L. REV. 1, 48 (1975).

[19] *See generally Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUMBIA L. REV. 629 (1943); Pasley, *The Interpretation of Government Contracts, A Plea For Better Understanding*, 25 FORD L. REV. 211 (1956).

[20] Webster's Third New International Dictionary Unabridged 2486 (1969).

[21] Corbin, Contracts §128 at 551 (1963).

[22] Briefing Papers, no. 75-3 (Shedd, Unconscionability in Contracts), p 2.

[23] Spasors Electronics Corporation, Nos. 12,877 & 12,936 (A.S.B.C.A. 28 Jan. 1970), 70-1 B.C.A. para. 8119.

[24] *Id.* at p. 37,725.

[25] *See* Avandale Shipyards, Inc., No. 8375 (A.S.B.C.A., 19 Apr. 1963), No. 40 B.C.A. para. 3743 and Astronetic Research, Inc., (NASA, 1963 B.C.A. para. 3794. *See, e.g.*, Araphoe Merchant Police and Guard Service, Inc., No. 4795 (G.S.B.C.A., 26 May 1977), 77-2 B.C.A. para 12572.

[26] American Standard Inc., No. 771-14 (NASA B.C.A., 29 Dec. 1972), B.C.A. para. 9899.

[27] *Id.*

[28] *Id.*, at 46,320.

[29] *Id.*

[30] *See* G.W. Galloway Company, Nos. 16,656 & 16,975 (A.S.B.C.A. 19 Sept. 1973), 73-2 B.C.A. para. 10,270.

[31] *See* National Radio Company, Inc., No. 14,707 (A.S.B.C.A., 19 May 1972), 72-2 B.C.A. para. 9486; McGrail Equipment Company Inc., No. 20,555 (A.S.B.C.A., 28 Jan. 1976), 76-1 B.C.A. para. 11,723.

[32] *See* I.T.T. Defense Communications Division, Nos. 11,858 & 13,439 (A.S.B.C.A., 29 July 1970), 70-2 B.C.A.

para. 8415; REDM Corporation, No. 17,378 (A.S.B.C.A., 29 June 1973), 73-2 B.C.A. para. 10,167.

[33] Briefing Papers, No. 75-3 (Shedd, Unconscionability in Contracts).

[34] Armed Services Procurement Regulation, Appendix A.

[35] *See* Old Atlantic Services Inc., No. 19,876 (A.S.B.C.A., 24 Mar. 1975), 75-1 B.C.A. para. 11,190.

[36] REDM Corporation, No. 17,378 (A.S.B.C.A., 29 June 1973), 73-2 B.C.A. para. 10,167.

[37] *Id.*

[38] *See* Sahasin Enterprise, No. 20,672 (A.S.B.C.A., 28 May 1976), B.C.A. para. 11,940.

[39] American Standard Inc., No. 771-14 (N.A.S.A. B.C.A., 29 Dec. 1972), 73-1 B.C.A. para. 9899, and AAA International Realty Inc., No. 75-5 (HUD B.C.A., 30 June 1976), 26-2 B.C.A. para. 11,969.

JAG Conference Meets at Charlottesville

The 1978 Judge Advocate General's Worldwide Conference was held at The Judge Advocate General's School during 10-13 October 1978. Over 160 judge advocate officers and civilian counsel attended the conference, which meets annually to update senior attorneys on the latest developments in military law. During the morning sessions presentations were made to the conference as a whole, while seminars in specialized areas of the law were conducted in the afternoon.

The 10 October session began with a welcome and status report on the JAG School by Colonel Barney L. Brannen, Jr., the Commandant. Colonel William K. Laray, Lieutenant Colonel William K. Suter, and Master Sergeant Gunther M. Nothnagel presented the OTJAG personnel report. A discussion of legal clerk training was presented by CW3 Jackie E. Hall; a report and mobilization update on the reserves was presented by Lieutenant Colonel Jack H. Williams and Lieutenant Colonel William L. Carew. Thereafter, Colonel Laray conducted a panel discussion of legal professional associations.

The 11 October session began with a presentation of new developments in administrative law by Colonel Darrell L. Peck. Colonel Thomas A. Kelly, Jr. spoke on the recent DA property accountability task force report. Colonel Robert B. Clarke and Colonel Daniel A. Lennon spoke on the U.S. Army Trial Defense Service. Colonel Germain P. Boyle gave an update on the U.S. Army Claims Service. Major F. John Wagner described the Army Law Library Service and the Standard Army Automated Support System. Major Harry S. Carmichael gave an update on the OTJAG Criminal Law Division.

The principal speakers at the 12 October session were Judge Tim Murphy of the District of Columbia Superior Court and General Donn A. Starry, Commander of TRADOC. Brigadier General Victor A. DeFiori spoke on the status of USALSA. Colonel Edward S. Adamkewicz reported the status of Government Appellate Division prior to Colonel Thomas H. Davis' report on Government Appellate Division. A panel discussion on promotion board procedures was presented by Brigadier General DeFiori, Colonel Lloyd K. Rector, and Colonel Anthony A. Movsesian.

A report on the status of military law in USAREUR was presented by Colonel Wayne E. Alley at the 13 October session. A similar report on Korea was provided by Colonel Richard J. Bednar. Colonel Richard K. McNealy and Mr. Waldemar A. Solf spoke on current International Law. Colonel Gordon A. Ginsburg, the USAF general counsel for the Army and Air Force Exchange Service discussed the Randolph-Sheppard Act as it applies to NAFI's. Lieutenant Colonel Carroll J. Tichenor discussed the law of unfair labor practices. Remarks by Major General Lawrence H. Williams, The Assistant Judge Advocate General, preceded a general officer panel. Major General Wilton B. Persons, Jr., The Judge Advocate General, closed the conference.

Other distinguished guests present at the conference included the Honorable Clifford L. Alexander, Jr., Secretary of the Army;

Brigadier General Hugh J. Clausen, Assistant Judge Advocate General/Military Law; Brigadier General Alton H. Harvey, Assistant Judge Advocate General/Civil Law; Mrs. Jill Wine-Volner, General Counsel, Department of the Army; Captain John Meighan, Assistant Judge Advocate General, Department of the Navy; Colonel Robert W. Norris and Colonel Larry W. Shreve, representing The Judge Advocate General, Department of the Air Force; Brigadier General James P. King, Director, Judge Advocate Division, United States Marine Corps; and Commander Christopher M. Holland, representing the Chief Council of the United States Coast Guard.

Videocassette tapes of the proceedings of the JAG Conference are available from Television Operations, TJAGSA. Details and a list of the tapes may be found eleewhere in this issue of *The Army Lawyer*.

ABA Young Lawyers Division Annual Meeting

Major Ted. B. Borek, ABA/YLD Delegate, Administrative Law Division, OTJAG

The Judge Advocate General has authority pursuant to the by-laws of the Young Lawyers Division (YLD) of the American Bar Association (ABA) to appoint an Army young lawyer (36 years old or less) as an assembly delegate for each convention of the YLD. During this August's centennial meeting of the ABA in New York City, I attended a number of activities sponsored by the YLD as a delegate appointed by TJAG. Fulfilling a representative capacity, I feel responsible for reporting my observations, and I also will comment on the value of ABA participation for young lawyers in the military. First, these are my observations.

Convention Programs. The calendar of events, covering nine days, was so filled with speaker programs, panel discussions, and meetings of various sections of the ABA that it was impossible to attend all the programs which were of interest or in some way relevant to issues facing a military lawyer. Timely issues repeated in various forums included discussions of the First Amendment issues surrounding the Skokie Case, presentations about President Carter and Chief Justice Burger's criticism of the services provided by and the courtroom competence of attorneys, debate on the effectiveness of the British barrister/solicitor system as a prototype for practice in the United States, programs on selection of federal judges, and discussions on the impact of the Bakke case on affirmative action programs. Such programs, of course, were in addition to many specialized programs one of which included an update on military law as viewed by the TJAG of each military service.

YLD Federal Practice Committee. At a meeting of the YLD Federal Practice Committee two issues of particular interest to military attorneys were outlined for study during 1978–79. The first issue has to do with federal district court certification; the other concerns military recruitment and placement.

Although still in the formulative stages, district court certification stems from criticism about the competence of trial attorneys. An ABA commission is formulating standards to qualify an attorney for practice before federal trial courts. Such qualifications may include an apprenticeship program and required courses of study both during law school and thereafter. While the standards adopted are expected principally to affect new attorneys, they likewise may have a unique effect on military lawyers. For example, if standards adopted do not credit practice before military courts as a means of certification, then military attorneys terminating service after several years and retiring judge advocates may be subjected to further schooling or a period of apprenticeship if they are to practice before federal courts. Consequently, it would appear wise for military practitioners interested in this area to provide input to this committee's formulation of standards.

Another area being examined, at the direction of the President of the YLD, is military recruitment and placement. Of particular interest are questions about how the services facilitate transition of a military attorney to civilian practice. In addition, however, there is the possibility that this committee will expand its area of concern to other subjects that may benefit military attorneys. Examining items such as promoting legislation that would permit reimbursement of certain professional fees, now paid by military attorneys out-of-pocket, studying methods of standardizing credit to be given for military practice amongst the states, and reviewing the necessity for professional liability insurance are examples of areas which could be studied by this committee. Obviously, participation of military attorneys with an interest in these areas is essential if this committee's work is to result either in favorable legislation or beneficial resolutions.

Military Justice Proposals. Changes to the military justice system proposed in the New York City Bar Bill, now H.R. 12613, 95th Cong., 2d Sess (1978), is another topic which was discussed and which will be examined this year by the ABA Standing Committee on Military Law and the General Practice Section Committee on Military Lawyers. Providing for numerous changes in the UCMJ, including elimination of summary courts-martial and adoption of a civilian-like jury system, many provisions of H.R. 12613 are opposed by senior judge advocates. Another bill which is likely to be examined is S. 1353, 95th Cong., 2d Sess. (1978). This bill provides for appeal to the Fourth Circuit of final decisions of COMA. Since this bill is opposed by some COMA members, alternative proposals, such as increasing the size of COMA and allowing for writs of certiorari to the Supreme Court, are likely to be studied also.

Video Resource Material. In celebration of its centennial year the ABA produced a film which was given its premier showing at the Convention and which is being made available for local programs free of charge. The film, entitled "In Search of Justice," is narrated by Henry Fonda, is in color, lasts about 30 minutes, and is appealing to lawyers and layman alike. It is a documentary recording a day in the life of our justice system. Arrangements to obtain the film may be made through the ABA Public Relations Department, 1155 E. 60th Street, Chicago, IL 60637.

Also available for programs in the area of continuing legal education are a series of Air Force produced television cassettes. These cassettes, which cover a variety of topics from the art of cross-examination to government contracting, were shown in continuous one hour segments at the Convention. They are generally excellent presentations many of which feature well known lawyers such as F. Lee Baily, Robert Begam, and Henry B. Rothblatt. In some cases the Air Force can provide state CLE accredition for viewing the tapes and completing an accompanying programed exercise. Those interested in learning more about the inventory, equipment requirements, and availability of the Air Force collection may contact HQ USAFE/JAES, 1900 Half St., S.W., Washington, D.C. 20324.

Law Day Awards of Achievement. Awards of achievement for law day activities include military organizations as a separate category. Consequently, submission of after action reports on law day activities that are conducted by SJA offices may result in ABA recognition. Reports submitted are displayed and judged at the annual ABA Convention. This year the OSJA, 1st Cavalry Division, Foot Hood, Texas, as well as several organizations from other services, received ABA awards of achievement for activities conducted during Law Day 1978. Law Day chairmen for next year may wish to consider submission of reports on law day activities not only as means of obtaining recognition but also for the public relations value of such participation.

YLD Resolutions. About twenty resolutions were considered and voted upon at Assembly meetings of the YLD. Amongst these the assembly passed several resolutions including those: supporting standards for a career program for judge advocates serving on extended active duty which included provisions on train-

ing, advancement, continuing legal education, and compensation; urging the Senate to give its consent to ratification, with certain reservations and conditions, of the International Convention on Elimination of All Forms of Racial Discrimination; supporting legislation that would finance abortion services for indigent women; favoring continuation of affirmative action programs in law school admission and legal hiring practices; and recommending a change in the Code of Professional Responsibility, Section EC 2-8, to include "television" within the parameter of restrictions on advertising. It also passed resolutions recommending passage of state laws which would allow pharmacists to substitute lower price generic equivalents for drugs prescribed by physicians and supporting expansion of federal funding for legal services for the elderly. After lively debate, the Assembly defeated a resolution which would have prevented future meetings of the ABA in states which had not passed the Equal Rights Amendment; support for the ERA, however, was affirmed. The assembly also defeated a resolution urging governmental entities to prohibit discrimination against homosexuals in public employment. When voting, the Army delegate's position on each of the resolutions was with that of the majority.

Comments on ABA Participation. I believe that the opportunity is present through committee participation and attendance at ABA function to broaden one's understanding of timely legal issues, to gain expertise in specialized areas of the law, and to influence positions taken on matters affecting both the legal profession and the practice of law in the military. While, as a pragmatic matter, I understand that ABA participation by lawyers in the Army may involve a monetary sacrifice, participation in many activities may be offset either by ABA or TDY funds. In other circumstances, such as when assigned near the nation's capital, many committee functions are conducted locally so that the cost of participation is minimal. Whatever the case may be, if you have any interest in obtaining additional information about the ABA programs discussed or if you have suggestions to be presented to the YLD, please contact me so that I can facilitate action on the interests that you have.

Commanders' Actions Upon Receipt of Communications From Debt Collectors

Major F. John Wagner, Jr., Developments, Doctrine and Literature Department, TJAGSA

Consumer protection appears, at first blush, to be the domain of the legal assistance officer.[1] However, certain legislation transcends the traditional judge advocate office boundaries. The Fair Debt Collection Practices Act,[2] a recently added chapter to the Consumer Credit Protection Act[3] is one of those legislative items which does not rest squarely in the territory of the legal assistance officer. As advisors of commanders, military lawyers practicing administrative law must be as equally conversant with the Act as their legal assistant counterparts. It is the commanders who receive letters of indebtedness pertaining to their soldiers, and it is those commanders who will be seeking the advice of their command and staff judge advocates as to their regulatory responsibilities concerning those letters.[4]

Commanders have traditionally, within the bounds of regulations,[5] responded to letters of indebtedness from persons and organizations alleging debts due and owing. The Act[6] does not alter any of the responsibilities of commanders toward creditors who are not debt collectors; but, if responding to the inquiries of debt collectors, judge advocates should advise commanders to move only after legal consultation in each and every case.

A debt collector is defined in the Act, as "any person who uses any instrumentality of interstate commerce or the mails in any business the principle purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[7] Generally the term includes anyone

who is in the debt collection business for third parties or any creditor who, in the process of collecting his debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. Certain categories of persons who collect debts are not included in the term "debt collector" for purposes of the Act.[8] For these limited exceptions, the Act itself should be consulted.

Debt collectors may correspond with commanders for two purposes: to acquire location information[9] and to inform the commanders of the debt collection or seek commanders' assistance in collecting the debt.[10]

If the purpose of the communication from the debt collector to a commander is to acquire location information, then the communication is not a letter of indebtedness and should not be so construed.[11] Within this type of correspondence the debt collector cannot indicate in any manner that the soldier owes a debt, communicate more than once with the employer except in limited circumstances spelled out in the Act, use a post card as the communication, or indicate in any manner that the debt collector is in the debt collection business or that the communication relates to the collection of a debt.[12] If the debt collector indicates in any manner that he is in the debt collection business, that the soldier owes a debt, or that the communication relates to debt collection, then the commander should construe the letter as being a letter of indebtedness. An indication that the debt collector is in the debt collection business or that the communication relates to the collection of a debt can be transmitted not only by the language of the letter, but by any language or symbol on any envelope or in the contents of any communications effected by the mails or telegram, to include letterheads.[13]

If the letter informs the commander of the debt collection effort or seeks the commander's assistance in collecting the debt, then the commander must consider it a letter of indebtedness and must follow certain procedures contained in AR 600-15 before taking any action. Assuming the claims are not patently false, misleading or obviously exorbitant, he must assure himself that a bonafide attempt has been made by the debt collector to satisfy the debt directly with the soldier and that there is no state law in the state wherein the debtor is located which precludes communications between a creditor and the employer of a debtor.[14] The commander must also satisfy himself that the DoD Standards of Fairness have been met and the Truth-in-Lending Act complied with.[15]

But even before considering the requirements of AR 600-15, the commander must be satisfied that: (1) the soldier gave prior consent directly to the debt collector which allowed the debt collector to communicate with third parties on the debt; (2) that the debt collector has the express permission of a court of competent jurisdiction to communicate with third parties in relation to the debt; or (3) that the letter of indebtedness is reasonably necessary to effectuate a postjudgment judicial remedy.[16]

If the commander is not satisfied that the debt collector has complied with one of the three requirements enumerated above, then the commander should not assist in the collection effort and should notify the debt collector of his reasons for not assisting.[17] The following language is recommended in notifying the debt collector that no collection assistance will be rendered: "Processing of debt complaints will not be extended to debt collectors who are in apparent violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* This policy has been established to avoid inadvertent violation by a debt collector of federal law."

Violations of the Act by debt collectors, whether intentional or unintentional have already occurred.[18] There is no reason to believe your commanders will not be the recipients of unlawful communications. Your ability to recognize violations or potential violations will avoid a situation where the Army inadvertently assists in continued violations of the Act.

Footnotes

[1] U.S. Dep't of Army, Pamphlet No. 27-12, Legal Assistance Handbook, ch. 10 (CI, 18 Aug. 1977).

[2]15 U.S.C. §§ 1692 *et seq.* (1978) [hereinafter referred to as the Act].

[3]15 U.S.C. §§ 1601 *et seq.*

[4]Army Reg. No. 600-15, Indebtedness of Military Personnel (11 Feb. 1970) [hereinafter cited as AR 600-15].

[5]AR 600-15, chs. 1 & 5.

[6]15 U.S.C. §§ 1692 *et seq.*

[7]15 U.S.C. § 1692a(6).

[8]*See* 15 U.S.C. § 1692a(6)(A) through (G).

[9]*See generally* 15 U.S.C. § 1692(b).

[10]*See generally* 15 U.S.C § 1692c(b).

[11]*Id.*

[12]15 U.S.C. § 1692(b).

[13]*See* 15 U.S.C. § 1692b(5).

[14]AR 600-15, para. 1-30.

[15]*Id.*

[16]15 U.S.C. § 1692c(b).

[17]*See generally* AR 600-15, para. 3-1(d). While the paragraph specifically relates to communication to employers which are prohibited by state law, the parallel to the Act is easily drawn. AR 600-15 has not been changed to reflect the "communication with third parties" provision of the Act.

[18]Over one thousand complaints of alleged violations of the Act have been received by the F.T.C. headquarters in Washington, D.C. This amount does not include a multitude of complaints received by F.T.C. regional offices throughout the United States. Telephone conversation with Mr. Alan Reffkin, (Project Manager, Fair Debt Collection Practices Act), Attorney, Division of Credit Practices, Federal Trade Comm'n, Washington, D.C.

Court Reporter Training for Fiscal Year 1979

Eight allocations are available for court reporter training at the Naval Justice School, Newport, Rhode Island in FY 79. Current prerequisites and class dates are listed below. Application for training must be submitted through the appropriate chain of command to DA, MILPERCEN, ATTN: DAPC-EPT-S, Alexandria, VA 22331 on DA Form 4187. DA, MILPERCEN, is the sole quota source for this course.

CLASS DATES

5 March 1979 - 13 April 1979
14 May 1979 - 23 June 1979
20 August 1979 - 28 September 1979

PREREQUISITES. High school graduate or equivalent as measured by GED tests. Qualified as a typist with a minimum typing speed of 40 words per minute. No hearing or speech impediments, with a minimum profile of P322122. Interview with and personal recommendation of local Staff Judge Advocate. Possess good military bearing. No record of Article 15 or offense for which the maximum punishment could have exceeded 6 months confinement at hard labor or permitted the imposition of a punitive discharge. Must have 2 years active duty remaining upon completion of course. Standard score of 110 or higher in aptitude area CL. Possess MOS 71D. Security clearance: None required. Waivers may be granted by DA, MILPERCEN, to one or more of these qualifications.

JAG Conference Available on Videocassettes

Television Operations of The Judge Advocate General's School announces that videocassettes of the 1978 Army Judge Advocate General's Conference, held 10 through 13 October 1978, are available, *in color,* to the field. Listed below are titles, running times and guest speakers. If you desire any of these programs, please send a blank ¾ inch videocassette of the appropriate length to The Judge Advocate General's School, U.S. Army, ATTN: Television Operations, Charlottesville, Virginia 22901.

TAPE #	TITLE	RUNNING TIME
1	**CLE PROGRAM FOR PROSECUTORS** Speaker: Lieutenant Colonel Dennis R. Hunt, Chief, Criminal Law Division, TJAGSA.	11:00

TAPE #	TITLE	RUNNING TIME
2	**OTJAG PERSONNEL REPORT, PART I** Speakers: Colonel William K. Laray, Executive, Office of The Judge Advocate General, and Lieutenant Colonel William K. Suter, Chief, Personnel, Plans & Training Office, Office of The Judge Advocate General.	60:00
3	**OTJAG PERSONNEL REPORT, PART II** Speaker: MSG Gunther Nothnagel, TJAG Liaison, MILPERCEN.	9:00
4	**LEGAL CLERK TRAINING** (U.S. Army Institute of Administration) Speaker: CW3 Jackie Hall, Chief Legal Instructor, ADMINCEN.	15:00
5	**USAR REPORT AND MOBILIZATION UPDATE** Speaker: Lieutenant Colonel Jack H. Williams, Director, Reserve Affairs Department.	20:00
6	**PROFESSIONAL ASSOCIATION PANEL DISCUSSION** Speakers: Rear Admiral Penrose Albright, USNR, Navy JAGC Reserve, and Mr. William G. Malone, National President, Federal Bar Association.	23:00
7	**THE COURT OF MILITARY APPEALS** A seminar highlighting recent developments and foreseeable trends resulting from the Court's decision. Speaker: Major John K. Wallace, III, Instructor, Criminal Law Division, TJAGSA.	56:00
8	**FREEDOM OF INFORMATION—RELEASING ALL BUT THE KITCHEN SINK** A seminar addressing interpretive trends in exemption 5 (the deliberative process exemption) of the FOIA. Illustrative issues will include the releasability of records covered by an attorney-client privilege, predecisional memoranda, and findings and conclusions of administrative investigations such as IG investigations. Speaker: Major Bryan H. Schempf, Instructor, Administrative and Civil Law Division, TJAGSA.	44:00
9	**NEW DEVELOPMENTS IN ADMINISTRATIVE LAW** Speaker: Colonel Darrell L. Peck, Chief, Administrative Law Division, Office of The Judge Advocate General.	48:00
10	**DA PROPERTY ACCOUNTABILITY TASK FORCE REPORT** Speaker: Colonel Thomas A. Kelly, Jr., ODSLOG, HQDA.	39:00
11	**REPORT ON TRIAL DEFENSE SERVICE** Speakers: Colonel Robert B. Clarke, Trial Defense Service, U.S. Army Legal Services Agency, and Colonel Daniel A. Lennon, Jr., Staff Judge Advocate, Training and Doctrine Command.	27:00
12	**CLAIMS UPDATE** Speaker: Colonel Germain P. Boyle, Chief, U.S. Army Claims Service, Office of The Judge Advocate General.	10:00

TAPE #	TITLE	RUNNING TIME
13	**DOCTRINE, DEVELOPMENTS AND LITERATURE UPDATE (ARMY LAW LIBRARY SERVICE & STANDARD ARMY AUTOMATED SUPPORT SYSTEM** Speaker: Major F. John Wagner, Combat Developments Officer, Developments, Doctrine & Literature Department, TJAGSA.	15:00
14	**CRIMINAL LAW DIVISION UPDATE** Speaker: Major Harry S. Carmichael, Criminal Law Division, Office of The Judge Advocate General.	28:00
15	**ITEMS OF INTEREST IN MILITARY PERSONNEL LAW** A seminar covering both recent developments and recurring problems. Military status, administrative eliminations and administrative remedies will be discussed, with emphasis on matters of practical application for staff judge advocates. Speaker: Major Joseph C. Fowler, Jr., Instructor, Administrative and Civil Law Division, TJAGSA.	53:00
16	**REFLECTIONS ON SOCIAL CHANGE AND LEGAL PRACTICE** Speaker: Judge Tim Murphy, Associate Judge, Superior Court, District of Columbia.	54:00
17	**USALSA REPORT** Speaker: Brigadier General Victor A. DeFiori, Chief/Chief Judge, U.S. Army Legal Services Agency.	12:00
18	**DAD/GAD REPORT** Speakers: Colonel Edward S. Adamkewicz, Defense Appellate Division, U.S. Army Legal Services Agency, and Colonel Thomas H. Davis, Government Appellate Division, U.S. Army Legal Services Agency.	14:00
19	**PANEL DISCUSSION—REFLECTIONS OF PROMOTION BOARD MEMBERS** Speakers: Brigadier General Victor A. DeFiori, Chief/Chief Judge, U.S. Army Legal Services Agency, Colonel Lloyd K. Rector, Staff Judge Advocate, Forces Command, and Colonel Anthony A. Movsesian, Staff Judge Advocate, U.S. Army Forces Readiness Command.	26:00
20	**USAREUR REPORT** Speaker: Colonel Wayne E. Alley, Office of the Judge Advocate, U.S. Army Europe & Seventh Army.	21:00
21	**KOREA UPDATE** Speaker: Colonel Richard J. Bednar, Judge Advocate, Eighth United States Army.	22:00
22	**INTERNATIONAL LAW UPDATE** Speakers: Colonel Richard K. McNealy, Chief, International Affairs Division, Office of The Judge Advocate General, and Mr. Waldemar A. Solf, International Affairs Division, Office of The Judge Advocate General.	15:00

TAPE #	TITLE	RUNNING TIME
23	**DISCUSSION OF RANDOLPH-SHEPPARD ACT** Speaker: Colonel Gordon A. Ginsburg, USAF, General Counsel, AAFES.	25:00
24	**UNFAIR LABOR PRACTICES** Speaker: Lieutenant Colonel Carroll J. Tichenor, Chief, Labor and Civilian Personnel Law Office, Office of The Judge Advocate General.	16:00
25	**TAJAG REMARKS** Speaker: Major General Lawrence H. Williams, The Assistant Judge Advocate General.	13:00
26	**GENERAL OFFICER PANEL**	29:00
27	**CLOSING REMARKS** Major General Wilton B. Persons, Jr., The Judge Advocate General.	11:00

The Army Law Library Service (ALLS)

ALLS ESTABLISHED

Effective 1 April 1978 the Army Field Law Library Service moved from the Military District of Washington to TJAGSA and officially became the Army Law Library Service. The Army Law Library Service is a branch of the Developments, Doctrine and Literature Department of TJAGSA. The Army Law Library Service is responsible for all Army law library matters including, but not limited to, acquisition, policy, holdings, modernization, new selections, standardization, transfer, and disposition. The new administrator of the Army Law Library Service, Mr. Richard S. Hunter, replaced Mr. Lonny Philips.

This column will appear periodically in *The Army Lawyer*. Its purposes are to announce regulatory changes and policies, and to comment on law library materials which are available through commercial publishers and the Government Printing Office. By making candid and brief comments on available law library materials, we hope to assist attorneys in the field by making them aware of new resources for the practice of law, and to prevent the unnecessary purchase of materials which, when fully examined, do not measure up to existing requirements.

When a comment is made on a particular item, we will indicate whether this item will become part of the Minimum Function Inventory (MFI). MFI is a term in the draft Army Regulation 1-115 which defines a list of law library materials which Army law libraries must normally maintain.

REGULATORY CHANGES

As of this writing the new AR 1-115, governing the operation of Army law libraries, is at TAGO and enroute to the printers.

We are hoping that the new regulation will be in the users' hands by the end of the year.

POLICIES

1. *Purchase of Periodicals.* The Army Law Library Service will no longer fund periodical subscriptions. Periodicals include, but are not limited to, law reviews, bar journals, newspapers, and magazines. Periodicals do not include looseleaf services, such as, U.S. Law Week, Family Law Reporter, and Criminal Law Reporter.

2. *Annual Tax Package Materials.* The annual tax package which in previous years had been distributed by OTJAG Legal Assistance Office will continue to be so distributed.

3. *Replacement of lost/misplaced law library materials.* The Army Law Library Service normally will not purchase law library materials which are lost or otherwise unaccounted for. The ALLS will replace such materials without purchase if they are on the current excess list maintained at TJAGSA. If repurchase is necessary then local funds must be used.

COMMENTS ON AVAILABLE LAW LIBRARY MATERIALS

1. Bender, *The Hearsay Handbook*, McGraw-Hill Book Co./Shepard's Citation, Inc. with 1977 Supplement. This book purports to discuss the common law rules of hearsay. It does not give much help or insight into unique military rules, and where it does discuss the federal rules of evidence, it is sometimes inaccurate. Misstatements were found in the discussions of exceptions and admissions. This book is not recommended for local purchase and will not be a part of the MFI.

2. Davis, *Administrative Law Treatise, Volume 1*. 2d Edition (1978), K. C. Davis Publishing Co. This publication replaces the well known first edition. The second edition is planned for either four or five volumes, and will be published one volume at a time. Volume 2 is planned for 1979 publication. The Treatise will be updated through pocket parts. The four volumes of the first edition are now out of date for most current problems. The currently useful volume is Administrative Law of the 70's (1976) and is available from the publisher for approximately $30.00. This treatise is recommended for purchase. No decision has yet been made on whether it will become MFI for administrative law.

3. Schmertz, Federal Rules of Evidence News, Callaghan & Co. This periodical, while not essential to the practice of military law, has proven very useful. Because it is a periodical it will not be purchased by the Army Law Library Service, However, the Army Law Library Service recommends its purchase with local funds for jurisdictions with military justice practices.

4. O'Reilly, Federal Information Disclosures, McGraw-Hill Book Co./Shephard's Citation, Inc. This is a very good treatise on the Freedom of Information Act and the Privacy Act. Because of present policy on withholding of information, this treatise would not be appropriate at the field level. The book is better used at the Department of the Army Level and above. This book is not recommended for local purchase and will not become MFI.

5. Weinstock, Planning An Estate, McGraw Hill Book Co./Shepard's Citations, Inc. This treatise received good marks as a basic estate planning tool. The book is updated through pocket parts annually. This book is recommended for purchase. This book will be listed on the MFI for legal assistance-estate planning.

6. The Military Law Reporter, Public Law Education Institute. This is a looseleaf service covering a wide range of military related statutes and regulations. While it is quite comprehensive, it has continually suffered by being at least a year behind schedule. As of this review (August 1978) the latest issue was dated August 1977. This item is not recommended and will not be placed on the military justice MFI.

7. Shepard's Military Justice Citations. Shepard's Inc., is now publishing a military justice citator. The first issue was sent to the field in late July. All Army libraries should now be receiving copies of this citator directly from Shepard's in a number considered adequate for local military justice activities. Requests for additional copies of the Shepard's military justice citator should be sent to the Army Law Library Service, TJAGSA, with justification for additional copies. Proper reasons for additional copies include: offices with remote branch offices, trial and defense counsel located in different buildings, etc.

Professional Responsibility

Criminal Law Division, OTJAG

The Judge Advocate General's Professional Responsibility Advisory Committee recently considered whether defense counsel's statement that an officer performing the duties of a summary court-martial was a liar was contrary to Ethical Consideration 8-6 and a violation of Disciplinary Rule 8-102(B) of the American Bar Association Code of Professional Responsibility.

EC8-6 provides in pertinent part: ". . . Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has the right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified."

DR 8-102(B) provides: "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

The facts ascertained by the Committee showed that the defense counsel and the summary court-martial did not agree as to which date had been set for a sentence rehearing. While the chief of military justice was discussing the rehearing with the defense counsel in the latter's office, the chief of military justice stated that the summary court officer had set the rehearing for a date certain. According to the chief of military justice, the defense counsel replied that "[the summary court officer] is a liar." The summary court officer, who fortuitously entered the administrative area of the defense section to deliver some papers relating to the rehearing, overheard the defense counsel's statement. The defense counsel represents the words spoken about the summary court officer were: "If he said that, he's lying," or "if he said that, it's a lie." The statement was overheard by laymen in the administrative area.

The Committee found that, regardless of which version of the statement one accepts, there was ample evidence that the defense counsel referred to the summary court officer as a liar while he was performing the duties of a summary court-martial, and the comment was directed at him in that role. Under the circumstances, and in view of its being overheard by laymen, the statement was inappropriate, unrestrained, and intemperate. Accordingly, the Committee concluded the defense counsel's conduct was both contrary to EC 8-6 and a violation of DR 8-102(B).

Reserve Affairs Section

Reserve Affairs Department, TJAGSA

1. RESERVE TRAINING WORKSHOP. The Judge Advocate General's Reserve Training Workshop will be held at TJAGSA 7-9 December 1978. This year the workshop will be devoted to discussions of the mutual support roles required of the JAG Reserve, unit vacancy problems, retention of former active duty Judge Advocates, tenure problems, and matters relating to Training Divisions.

Attendance by JA reserve officers is limited to Commanders of Military Law Centers, ARCOM Staff Judge Advocates, and SJAs of certain General Officer Commands.

2. ANNUAL TRAINING/ADT Requests. Requests for Annual Training or Active Duty for Training from USAR JAGC officers must reach the JAG School (ATTN: JAGS-RA) not less than *60 days* before the active duty is to begin. The JAG School indorses these requests to the U.S. Army Reserve Components Personnel and Administration Center, which issues the orders. The RCPAC *will not* issue orders

unless the request and indorsement reach it not less than 45 days before the active duty is to begin.

3. RESERVE COMPONENTS TECHNICAL TRAINING (ON-SITE) REVISED SCHEDULE. The schedule which follows sets forth the revision of the on-site training schedule printed in the September issue of *The Army Lawyer*. Also included is the revision of the list of the local action officers and the training site location.

	Date & Time	City	Subject	Instructor	Action Officer Phone	Training Site Location
10	Denver (to include Colorado Springs)	10 Mar 79 0800-1700	Criminal Law Admin & Civil Law Contract Law	MAJ Wallace LTC Kenny LTC Nutt	LTC Bernard Thorn 303-573-7600	Quade Conference Center
	Salt Lake City	11 Mar 79 0800-1700	Criminal Law Admin & Civil Law	MAJ Wallace LTC Kenny	LTC Jimi Mitsunaga 801-322-3551	Bldg #107, Fort Douglas
11	Louisville (to include Lexington)	3 Mar 79 0800-1700	Criminal Law Admin & Civil Law Contract Law	MAJ Eisenberg CPT Plaut MAJ Wilks	LTC Martin F. Sullivan 502-587-0145	Hangar #7, Bowman Field
	Memphis	4 Mar 79 0800-1700	Criminal Law Admin & Civil Law Contract Law	MAJ Eisenberg CPT Plaut MAJ Wilks	MAJ Robert G. Drewry 901-526-0542	Marine Hospital
12	Harrisburg	3 Mar 79 0800-1700	Criminal Law Admin & Civil Law	MAJ Basham MAJ Godwin	LTC Harvey S. Leedom 717-782-6310	Bldg #442, New Cumberland Army Depot
20	Columbus	5 May 79 0800-1700	Criminal Law Admin & Civil Law	MAJ Gravelle LTC Kenny	CPT Michael C. Matuska 614-222-7600	Conference Room HQ 83rd ARCOM, Bldg 306 Defense Construction Supply Center

36

JUDICIARY NOTES

U. S. Army Judiciary

ADMINISTRATIVE NOTES

1. Staff judge advocates should be especially careful when preparing draft actions for the convening authority and in reviewing published orders which promulgate the results of that action. For example, in one such case received in the Office of the Clerk of Court, the convening authority approved the sentence but suspended for one year confinement in excess of 30 months. Instead of providing that unless the suspension was sooner vacated "the unexecuted portion of the *sentence to confinement* will be remitted without further action," the action stated that "the unexecuted portion of the *punishment* will be remitted without further action." This wording had the effect of remitting the unexecuted portion of the entire sentence, and was obviously not the intent of the convening authority.

2. Notification of the convening authority's action should be provided by electrical message to the appropriate confinement facility commander within 24 hours of such action. This will avoid any potential conflict between actions taken by the convening authority and the confinement facility. See paragraph 12-3, AR 27-10.

CLE NEWS 192-40-7850

1. TJAGSA CLE Courses

November 27-December 1: 43d Senior Office Legal Orientation (5F-F1).

December 4-5: 2d Procurement Law Workshop (5F-F15).

December 7-9: JAG Reserve Conference and Workshop.

December 11-14: 6th Military Administrative Law Developments (5F-F25).

January 8-12: 9th Procurement Attorneys' Advanced (5F-F11).

January 8-12: 10th Law of War Workshop (5F-F42).

January 15-17: 5th Allowability of Contract Costs (5F-F1).

January 15-19: 6th Defense Trial Advocacy (5F-F34).

January 22-26: 44th Senior Officer Legal Orientation (5F-F1).

January 29-March 30: 89th Judge Advocate Officer Basic (5-27-C20).

January 29-February 2: 18th Federal Labor Relations (5F-F22).

February 5-8: 8th Environmental Law (5F-F27).

February 12-16: 5th Criminal Trial Advocacy (5F-F32).

February 21-March 2: Military Lawyer's Assistant (512-71D20/50).

March 5-16: 79th Procurement Attorneys' (5F-F10).

March 5-8: 45th Senior Officer Legal Orientation (War College) (5F-F1).

March 19-23: 11th Law of War Workshop (5F-F42).

March 26-28: 3d Government Information Practices (5F-F28).

April 2-6: 46th Senior Officer Legal Orientation (5F-F1).

April 9-12: 9th Fiscal Law (5F-F12).

April 9-12: 2d Litigation (5F-F29).

April 17-19: 3d Claims (5F-F-26).

April 23-27: 9th Staff Judge Advocate Orientation (5F-F52).

April 23-May 4: 80th Procurement Attorneys' Course (5F-F10).

May 7-10: 6th Legal Assistance (5F-F23).

May 14-16: 3d Negotiations (5F-F14).

May 21-June 8: 18th Military Judge (5F-F33).

May 30-June 1: Legal Aspects of Terrorism.*

June 11-15: 47th Senior Officer Legal Orientation (5F-F1).

June 18-29: JAGSO (CM Trial).

June 21-23: Military Law Institute Seminar.

July 9-13 (Proc) and July 16-20 (Int. Law): JAOGC/CGSC (Phase VI Int. Law, Procurement).

July 9-20: 2d Military Administrative Law (5F-F20).

July 16-August 3: 19th Military Judge (5F-F33).

July 23-August 3: 81st Procurement Attorneys' Course (5F-F10).

August 6-October 5: 90th Judge Advocate Officer Basic (5-27-C20).

August 13-17: 48th Senior Officer Legal Orientation (5F-F1).

August 20-May 24, 1980; 28th Judge Advocate Officer Graduate (5-27-C22).

August 27-31: 9th Law Office Management (7A-713A).

September 17-21: 12th Law of War Workshop (5F-F42).

September 28-28: 49th Senior Officer Legal Orientation (5F-F1).

*Tentative.

2. Civilian Sponsored CLE Courses.

November

27-1 Dec: George Washington Univ., Contracting with the Government, G.W.U. Library, WASH DC. Contact: Government Contracts Program, G.W.U., 2000 "H" Street NW, WASH DC 20052. Phone (202) 676-6815. Cost: $525.

27-29: Univ. Denver College of Law, Research & Development Contracting, Sheraton National, Arlington, VA. Contact: Seminar Division Office, Suite 500, 1725 K St. NW, WASH DC 20006. Phone: (202) 337-7000. Cost: $500.

27-29: Univ. of Santa Clara, Cost Estimating for Government Contracts, Sheraton National, Arlington, VA. Contact: Seminar Division Office, Suite 500, 1725 K St. NW, WASH DC 20006. Phone (202) 337-7000. Cost: $500.

30-2 Dec: ALI-ABA, Land Use Litigation: Critical Issues for Attorneys, Developers, and Public Officials, New Orleans, LA. Contact: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

30-1 Dec: PLI, Public Sector Labor Relations, Barbizon Plaza Hotel, NY. Contact: Practicing Law Institute, 810 Seventh Ave., New York, NY 10019. Phone: (212) 765-5700. Cost: $185.

30-1 Dec: Professional Seminar Associates, Inc., Personnel Law, The Drake Hotel, Chicago, IL. Contact: Professional Seminar Associates, P.O. Box 314, Westfield, NJ 07090. Phone: (201) 232-2455. Cost: $350.

December

1-2: ALSI, Federal Practice Update and Analysis, Radisson St. Paul Hotel, St. Paul MN. Contact: Advanced Legal Studies Institute, McGraw-Hill, 1221 Avenue of the Americas, New York, NY 10020. Phone: (212) 997-2118. Cost: $195.

1-2: PLI, The Abused and Neglected Child, Sir Francis Drake Hotel, San Francisco, CA. Contact: Practising Law Institute, 810 Seventh Ave., New York, NY 10019. Phone: (212) 765-5700. Cost: $100.

3-6: National College of District Attorneys, Prosecuting Crimes Against Persons, San

Diego, CA. Contact: NCDA, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

4-8: George Washington Univ., Equal Employment Course, Sheraton National, Arlington, VA. Contact: George Washington University, Seminar Division Office, Suite 500, 1725 K St. NW, WASH DC 20006. Phone: (202) 337-7000. Cost: $600.

4-6: George Washington Univ., Patents and Technical Data, G.W.U. Library, WASH DC. Contact: Government Contracts Program, G.W.U., 2000 "H" St. NW, WASH DC 20052. Phone (202) 676-6815. Cost: $425.

4-5: PLI, Employment Discrimination Litigation, Stanford Court Hotel, San Francisco, CA. Contact: Practising Law Institute, 810 Seventh Ave., New York, NY 10019. Phone: (212) 765-5700. Cost $200.

4-6: University of Santa Clara Law School, Government Contract Costs, The Cascades Hotel, Williamsburg, VA. Contact: Seminar Division Office, Suite 500, 1725 K. St. NW, WASH DC 20006. Phone; (202) 337-7000. Cost: $475.

7-8: Professional Seminar Associates, Inc., Personnel Law, The Watergate Hotel, WASH DC. Contact: Professional Seminar Associates, P.O. Box 314, Westfield, NJ 07090. Phone: (201) 232-2455. Cost: $350.

8-9: Practising Law Institute, Medical Malpractice Litigation, The Biltmore Hotel, New York, NY. Contact: Practising Law Institute, 810 Seventh Ave., New York, NY 10019. Phone: (212) 765-5700. Cost: $175.

10-15: National Judicial College, Administrative Law Procedure—General, Univ. of Nevada, Reno, NV. Contact: National Judicial College, University of Nevada, Reno, NV 89557. Phone: (703) 784-6747.

14-16: ALI-ABA, The New Federal Bankruptcy Code, New York, NY. Contact: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

14-15: PLI, Advanced Criminal Trial Tactics, Americana Hotel, New York, NY. Contact: Practising Law Institute, 810 Seventh Ave., New York, NY 10019. Phone: (212) 765-5700. Cost: $200.

14-15: PLI, Post Mortem Estate Planning, Sheraton Harbor Island Hotel, San Diego CA. Contact: Practising Law Institute, 810 Seventh Ave., New York, 10019. Phone: (212) 756-5700.

15-16: ALSI, Federal Practice Update and Analysis, Detroit Plaza Hotel, Detroit, MI. Contact: Advanced Legal Studies Institute, McGraw-Hill, 1221 Avenue of the Americas, New York, NY 10020. Phone (212) 997-2118. Cost: $195.

15-17: NCCDL, Advanced Cross-examination Techniques: Agents, Informers, Experts and Immunized Witnesses, Dunes Hotel & Country Club, Las Vegas, NV. Contact: The National College of Criminal Defense Lawyers and Public Defenders, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004. Phone: (713) 749-2283. Cost: $150.

18-20: Univ. of Santa Clara, Cost Estimating for Government Contracts, San Diego Hilton, San Diego, CA. Contact: Seminar Division Office, Suite 500, 1725 K St. NW, WASH DC 20006. Phone: (202) 337-7000. Cost: $500.

20-21: Professional Seminar Associates, Inc., Personnel Law, Hyatt Regency Hotel, Houston, TX. Contact: Professional Seminar Associates, P.O. Box 134, Westfield, NJ 07090. Phone: (201) 232-2455. Cost: $350.

Legal Assistance Items

Major F. John Wagner, Jr., Developments, Doctrine and Literature Department, Major Joseph C. Fowler, and Major Steven F. Lancaster, Administrative and Civil Law Division, TJAGSA.

ITEMS OF INTEREST

Administration—Preventive Law Program. *Book-of-the-Month Club. Inc., will pay $85,000 in settlement of a civil penalty suit charging it with violating the Federal Trade Commission's rule governing negative option plans,* under terms of a consent judgment entered in the U.S. District Court for the Southern District of New York.

The company has also agreed to rescind minimum puchase obligations for members who joined its book clubs in response to challenged ads. These members will be notified by the company. In a negative option plan, a seller notifies the member subscriber of periodic selections of merchandise. Unless the subscriber notifies the seller otherwise, the seller ships the merchandise and bills the subscriber. The Commission's negative option rule became effective June 9, 1974 and requires, among other things, that all promotional material clearly disclose the details of the plan.

The civil penalty complaint alleges that Book-of-the-Month Club, Inc. violated the rule by failing to disclose in advertising for the Book-of-the-Month Club, the Quality Paperback Book Club and the Cooking and Crafts Club that a charge is added to a book's price for shipping and handling.

The company is a subsidiary of Time, Inc. and has its principal office at 485 Lexington Ave., New York City. In entering into the consent judgment it did not admit the offenses alleged in the complaint or liability for them. [Ref: Ch. 2, DA Pam 27-12.]

Administration/Preventive Law. *Consumers who have their eyes examined now must receive a copy of their prescription when corrective lenses are called for.* This, in the view of the Federal Trade Commission (FTC), will enable consumers to shop around more effectively for eyeglasses and contact lenses.

Last June, the FTC adopted a rule concerning the selling of eyeglasses and contact lenses. The rule, which carries the force of law, removed virtually all public and private restraints on the advertising of price and availability of eye examinations and prescription lenses.

The rule was temporarily delayed beyond the effective date of July 3 by Chief Justice Warren Burger pending consideration of a stay application filed by the American Optometric Association, but on July 13 the Chief Justice lifted the stay and rule is now in effect. [Ref: Ch. 2, DA Pam 27-12.]

Administration—Preventive Law Program; Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protections—Fair Debts Collection Practices Act.

Debt collection agencies and other organizations that regularly collect debts will be the subject of an industry-wide investigation by the Federal Trade Commission.

The investigation will focus on collectors' compliance with the recently enacted Fair Debt Collection Practices Act (FDCPA). In addition, the Commission will examine whether collection practices of certain businesses, such as retail creditors, may be unfair or deceptive under the FTC Act.

Some of the practices to be examined are:

Harrassing or abusive telephone calls to debtors, falsely implying that the collector is an attorney, using deceptive forms in attempting to collect debts, and representing that wages or property will be garnished or seized unless the collector intends to do so, and such action is legal. All of these practices are prohibited by the FDCPA.

Louis Goldfarb, Assistant Director for Credit Practices, notes that the FTC has received more than a thousand letters from consumers in the past six months, complaining about practices such as harrassing, telephone calls, particularly at their place of employment; and unauthorized contact with employers, neighbors and friends.

Goldfarb urges consumers who believe that they have been the object of such tactics to write the FTC's Division of Credit Practices.

The FDCPA, which became effective in March 1978, prohibits independent debt collectors from engaging in unfair and unscrupulous collection practices. Approximately five thousand collection agencies are subject to the Act. In 1976, collection agencies processed debts of approximately $5-billion.

The Act covers personal, family and household debts, such as those for the purchase of a car, for medical care and for charge accounts.

In addition to prohibiting specified unfair practices, the Act gives consumers:

The right to dispute the validity of the debt.

The right to require that a collection agency stop making further contact with the consumer in connection with the debt.

The right to sue debt collection agencies for illegal practices.

The Act also gives the FTC authority to enforce the law by seeking injunctions or civil penalties for up to $10,000 per violation.

Although the FDCPA does not cover debt collection practices of organizations other than collection agencies, the FTC will also examine the practices of businesses, such as department stores, which regularly engage in collection activities in order to determine if they are violating the FTC Act.

Persons who believe they have been the object of illegal collection practices should contact the Federal Trade Commission, Debt Collection Practices, Division of Credit Practices, Sixth St. and Pennsylvania Ave., N.W., Washington, D.C. 20580. Telephone No. (202) 724-1130. [Ref: Chs. 2 & 10, DA Pam 27-12.]

Administration—Preventive Law Program. Maxwell Auslander, owner and president of Auslander Decorator Furniture, Inc., also doing business as ADF Furniture, Inc., has agreed to pay $50,000 in civil penalties for violations of a 1974 Federal Trade Commission order.

The settlement, a consent judgment entered by the United States District Court for Maryland, also requires Auslander to establish an escrow fund of $60,000 for making cash refunds to past customers who had paid for merchandise that was not delivered.

The FTC's 1974 order had prohibited the receipt of money for furniture that was never delivered and prohibited Auslander from failing to refund within five business days of the agreed delivery dates all monies paid by those customers.

Under terms of the consent judgment, Maxwell Auslander must also publish "notice" advertisements in eight newspapers serving the Baltimore and Washington, D.C. metropolitan areas, for the purpose of locating customers who paid for undelivered merchandise since May 29, 1974 and who may be eligible for cash refunds. The refund offer would expire January 30, 1979.

For further information call: James D. Tangires, Federal Trade Commission, (202) 354-8302. [Ref: Ch. 2, DA Pam 27-12.]

Administration—Preventive Law Program. *On 28 September the Federal Trade Commission charged Hertz Corporation in a civil penalty suit with 264 violations of its "holder-in-due-course" rule.* The suit was filed on the Commission's behalf by the Department of Justice in the U.S. District Court in Miami.

The holder-due-course rule (known technically as the Preservation of Consumers' Claims and Defenses Rule) requires that a provision be inserted in many consumer credit contracts. The provision insures that the consumer's right to assert legal claims and defenses against the

seller can be expanded to the creditor as well. In most instances this option would not be available to a consumer whose contract does not contain the required provision.

Unless the contract contains the required notice provision, the buyers might have to pay for merchandise never received or for defective merchandise.

The complaint alleges that Hertz violated the rule by accepting the proceeds of loans made by 20 credit unions to their members. The loans were made for the purpose of buying used cars from Hertz at special sales jointly organized and promoted by Hertz and the credit unions. The contracts failed to contain the required provision, despite the credit unions' agreement to incorporate it into the contracts resulting from the special sales.

The Commission requests that the court, among other things:

assess penalties of $10,000 against Hertz for each of the alleged 264 violations;

order Hertz to compensate consumers whose ability to assert claims and defenses against the credit union was foreclosed because of the absence of the required contract provision; and permanently enjoin Hertz from future violations of the rule.

A wholly-owned subsidiary of RCA Corporation, Hertz is headquartered at 660 Madison Ave., New York City.

Request for FTC materials should be made by telephone to Public Reference Branch (202 523-3598), or by letter to Secretary, Federal Trade Commission, Washington, D.C. 20580. 1024/HERTZ [Ref: Ch. 2, DA Pam 27-12.]

Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protections—Door to Door Sales.

The Federal Trade Commission has served notice in a civil penalty suit that its trade regulation rule imposing a cooling-off period on door-to-door sales covers sales not only in the home, but in temporarily-rented restaurant and motel rooms as well.

In this suit, American Bridal Consultants is charged with violating the rule on various motel-room and restaurant-room sales. A consent judgment settling the action has been entered in the U.S. District Court for the Western District of Oklahoma. The judgment provides both for the payment of penalties and for refunds to a group of ABC's customers. The matter was handled by the Commission's regional office in Dallas.

ABC, owned by Wayne Lasater, sells kitchen and dining utensils on college campuses. Its principal office and place of business is at 2912 Lakeside Drive, Village, OK.

The Commission's cooling-off rule requires door-to-door sellers, and others who make sales of consumer products away from their places of business, to provide buyers with a three-day period in which they may elect to cancel the transaction without penalty or fee.

The civil penalty complaint charges that ABC failed to: (1) notify buyers orally or in writing of their right to cancel, (2) furnish them "Notice of Cancellation" forms, and (3) honor valid notices of cancellation. Also, it allegedly misrepresented the buyer's right to cancel.

Under the settlement, ABC (1) must pay $3,000 in civil penalties for past violations of the rule, (2) is permanently enjoined from violating it in the future, and (3) must offer a cancellation opportunity with full refunds to customers who had cancelled or attempted to cancel their contracts. FTC staff estimates the potential restitution at $13,000.

In entering into the consent judgment, ABC did not admit liability for the offenses charged in the complaint. [Ref: Ch. 10, DA Pam 27-12.]

Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protection—Petroleum Marketing Practices Act. On 19 June 1978 Congress passed the Petroleum Marketing Practices Act. *Title II of the Act is entitled Octane Disclosure.* Under the disclosure provisions of § 202(15 U.S.C. 2822) "[E]ach gasoline retailer shall display in a clear and conspicious

manner, at the point of sale to ultimate purchasers of automotive gasoline, the octane rating of such gasoline, . . . " The Act delegates the rulemaking and enforcement responsibility to the Federal Trade Commission, assisted in part by the Environmental Protection Agency. The FTC has also been given the authority to require manufacturers of new motor vehicles to display on each motor vehicle the octane requirements of that particular vehicle. The disclosure provisions of Title II are effective 19 March 1979. [Ref: Ch. 10, DA 27-12.]

Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protections—Truth in Lending Act. The 8th Circuit joins the 3d Circuit *(Johnson v. McCrackin-Sturman Ford, Inc.)*, the 5th Circuit *(Martin v. Commercial Securities Co., Inc.)*, the 9th Circuit *(St. Germain v. Bank of Hawaii)*, and the 10th Circuit *(Begay v. Ziem Motor Co.)* in holding that, absent a regulation requiring it, the mere right to accelerate is not a charge payable in the event of late payment. Therefore, *failure to disclose the financial impact of acceleration or the existence of such a clause in an installment contract is not violative of the Truth and Lending Act or Regulation Z.* The court noted that the Federal Reserve Board's official staff interpretation No. FC-0054 is to the effect that "the mere right to accelerate . . . is not a charge payable in the event of late payment," and [t]herefore, it need not be disclosed under § 226.8(b)(4)." *Griffith v. Superior Board* and *Ford Motor Credit Co.*, F.2d (8th Cir., 1978). [Ref: Ch. 10, DA Pam 27-12.]

Commercial Affairs—Commercial Practice and Control—State Statutory and Regulatory Controls.

There have been some recent changes in the consumer protection laws of Louisiana, particularly in the areas of garnishment exemptions, home solicitation sales, usury exemptions and deferral charges. For a complete report of these changes see C.C.H., Installment Credit Guide Consumer Credit Report 261, September 5, 1978. [Ref: Ch. 10. DA Pam 27-12.]

Domestic Relations—Child Support. *Although several states, including New York, permit cancellation or suspension of child support where a custodial parent interferes with court-ordered visitation rights, a New York Appellate Court has recently ruled that the converse situation, failure to make support payments, will not necessarily cause the cancellation of visitation rights.*

In Farhi v. Farhi, 4 FLR 2617, (NY App Div 4th Dept, 1978), the non-custodial father, during a visitation period, absconded with his son to Pennsylvania and unlawfully kept the child from the custodial mother until she agreed to reduce support payments and to dropping charges against the father for arrearages. In spite of the father's outrageous conduct, the court held that the father-son relationship was essential to the child's emotional development and that the only ground to deny visitation was substantial evidence that the visitations are detrimental to the child's interests. The court directed, therefore, that the father's visitation rights would be continued under conditions which would prevent future child snatching but still allow continuation of the father-son relationship.

Family Law—Infants or Minors—Child Abuse—*Several items regarding child abuse appeared in the 19 September 1978 issue of the Family Law Reporter.* An Illinois Appellate Court held that the best interests of the child governed the admissibility of evidence in a neglect proceeding, *State v. Bariffe*, 4 Fam. L. Rept. (BNA) 2728 [1978]. In this case, the court approved the introduction of evidence regarding prior abuse of two children in the family to establish that a third child, not yet abused, was being subjected to an environment injurious to that third child's welfare. In other words, in Illinois, (and the court cited supporting cases from Colorado, Missouri and Washington) a juvenile court need not wait until each child has been actually abused before taking action.

Unlike the *Bariffe* holding, which involved a civil action, the Virginia Supreme Court, in a criminal case, reversed a mother's conviction for maliciously wounding her three-year-old son. The court held that prosecution introduced evidence of past abuse was highly prejudicial, *Smarr v. Commonwealth*, 4 Fam L. Rept. (BNA) 2732 [1978].

Finally, in the child abuse area, Mississippi has recently enacted legislation providing that either spouse may be compelled to testify against the other in a child abuse case. [House Bill 49 amending Sec. 13-1-5 of the Mississippi code.]

NEW LEGISLATION

1. *California is now the first state with a summary dissolution of marriage procedure.* Although the new legislation specifically states that the parties should seek legal advice regarding the dissolution, the entire procedure can be completed by the couple without having to hire a lawyer or appear in court.

There are several essential requirements that must exist before the new procedure can be used. Basically, the couple must be childless, and the wife, to the best of her knowledge cannot be pregnant. Also, the marriage must be less than two years old, the parties must waive any rights to spousal support, cannot have any interest in real property, have less than $5000 worth of personal property (excluding all encumberances and automobiles) and have no unpaid obligations in excess of $2000 incurred from the date of the marriage (excluding automobiles).

If the requirements are met, the parties may file a joint petition which will be finalized upon application by either party or on the court's motion six months after filing. During that six month period, the couple is still considered married and, in fact, either spouse can revoke the joint petition and terminate the proceeding.

This new legislation amends Section 4514 of and adds Chapter 5 to Title 3, Part 5, Division 4 of the California Civil Code.

2. *Spousal abuse has become the subject of legislation, either passed or pending, in virtually every state in the past few years.* The states have taken a variety of approaches in dealing with this problem. One is the establishment of shelters to allow victims and their children to leave home when necessary. Others have provided procedures for more easily obtaining a restraining order barring the violent spouse from the home. A growing trend is legislation giving police more power to make arrests and more training to deal with such disputes. Several states are making these remedies available to unmarried cohabitants as well as spouses.

The most recent legislation appears in the new Alaska criminal code which permits "probable cause misdemeanor arrests" by police officers, even though they did not witness the incident. Additionally, Minnesota now mandates arrest and detention in domestic violence cases rather than just the issuance of a citation to the offending party and permits judges to condition sentences to probation upon the defendant's participation in some type of counseling or therapy program.

JAGC Personnel Section

PP&TO, OTJAG

1. AUS Promotions

Lieutenant Colonel

MC HARDY, John A.	5 Aug 78

CAPTAIN

ALLINDER, William L.	8 Aug 78
BLACK, Scott C.	8 Aug 78
DICKEY, Gene A.	8 Aug 78
DUBIA, Donald H.	8 Aug 78
FITZPATRICK, John M.	8 Aug 78
FOWLER, David L.	8 Aug 78
MC FETRIDGE, Robert	8 Aug 78
MC GEHEE, Jack E.	8 Aug 78
MINOR, Robert L.	8 Aug 78

CAPTAIN

PHILLIPS, Dennis L.	8 Aug 78
SAUNDERS, Raymond M.	8 Aug 78
SCHAEFER, John A.	8 Aug 78
SPAULDING, Milton C.	8 Aug 78
THEBAUD, Charles C.	8 Aug 78
WARD, Joseph M.	8 Aug 78
WARNER, Karl K.	8 Aug 78
WHITE, Ronald W.	22 Sept 78
WITTMAN, Craig P.	8 Aug 78
WOODRUFF, Joseph A.	8 Aug 78
ALTHERR, Robert F.	23 Oct 78
BUTLER, Robert M.	23 Oct 78

2. RA Promotions

COLONEL

LASSITER, Edward A.	12 Aug 78
DAVIS, Thomas H.	26 Sep 78
OVERHOLT, Hugh R.	25 Sep 78

LIEUTENANT COLONEL

HOUGEN, Howard M.	25 Sep 78
MOONEYHAM, John A.	23 Sep 78
RABY, Kenneth A.	7 Sep 78
WILLIAMS, Jack H.	1 Oct 78

MAJOR

BURKE, Michael A.	18 Sept 78
BURNS, Thomas P. III	18 Aug 78
DEVINE, Frank E.	5 Aug 78
EGGERS, Howard C.	21 Sep 78
GATES, E. A.	16 Sep 78
O'BRIEN, Maurice J.	28 Aug 78

CAPTAIN

ANDERSON, Paul B.	7 Oct 78
BUTLER, James L.	12 Jul 78
CARR, John C.	13 Oct 78
DAVIDSON, Van M.	25 Aug 74
ELLIS, John O.	8 Sep 78
GALLIVAN, Richard A.	4 Jun 77
HAGGARD, Albert L.	11 Oct 78
LANCE, Alan G.	10 Jul 78
LONG, James D.	4 Aug 77
MOGABGAB, Stephen A.	7 Oct 78
MOORE, Joseph W.	12 Nov 77
MORGAN, Michael P.	28 Sep 77
MOYE, Danny R.	14 Sep 78
ROMIG, Thomas J.	21 Oct 78
SCHWARZ, Paul W.	9 Jul 78
WINGATE, Thomas P.	9 Jun 78

3. Reassignments:

Name	*From*	*To*
	Majors	
Brooks, Clifford	USAREUR	Pentagon
Kittel, Robert	Hawaii	WASH, DC
Millard, Arthur	Presidio of SF	Ft. McPherson, GA
Spiller, John E.	Hawaii	Ft McPherson, GA
	Captains	
Baldwin, William	Ft. Ben Harrison, IN	88th Basic Class, TJAGSA
Brooks, Waldo	USAREUR	S&F, USMA
Dantonio, Gregory	Korea	Ft. Huachuca, AZ
Ecker, Frank	USAREUR	Falls Church, VA
Good, Barbara L.	Ft. Stewart, GA	Korea
Griffin, Thomas	Ft. Jackson, SC	Korea
Harris, Jeffrey	Ft. Riley, KS	Korea
Keefe, Thaddeus	Korea	Ft. Sam Houston, TX
Lee, Augustus	Korea	Presidio of SF
Lohff, John	Alaska	Ft. Drum, NY
McCann, James P.	USAREUR	Kwajalein Missile Range
Meinhold, Don	Korea	Ft. Carson, CO
Monahan, Eugene	Korea	Ft. Belvoir, VA

Name	*From*	*To*
Niederpruem, C.R.	Ft. Dix, NJ	USATDS, Ft. Dix, NJ
Raymond, William	Korea	Ft. Ord, CA
Robinson, Stephen (revocation)	Ft. Meade, MD	USA Claims Svc, Ft. Meade, MD
Scott, David	USAREUR	Dugway Proving Grounds, UT
Simms, Stuart	Ft. Lewis, WA	Korea
Thiele, Alan	Korea	Ft. Sheridan, IL
	Warrant Officers	
Bailey, Dennis	Aberdeen Proving Grounds, MD	Ft. Gordon, GA

4. Direct Line to MILPERCEN. All active duty officers and warrant officers can call the Personnel Records Division's Automatic Telephonic Answering Service to ask questions pertaining to their Official Military Personnel File (OMPF). This service operates on a 24-hour basis and can be reached by calling AUTOVON 221-8792/3 or Commercial (202) 325-8792/3. As calls are received, a recorded message will ask for basic identification data from the caller. The caller will then be asked to state the request. Requests are transcribed and logged during the next normal operating day. Every effort is made to provide a telephonic or written response to the individual within five working days.

Questions which are appropriate for using this service include:

- Has the OER for the period ending (state ending date of the OER) been filed?
- Has the award (indicate specific award and date of the award) been filed?
- Has (specific document authorized for file) been filed?

Questions which cannot be answered by using this service include:

- Requests for copies of documents or copies of the OMPF. Only written requests will be accepted.
- Lengthy or complicated problems pertaining to the OMPF. These questions should be referred through the servicing Military Personnel Office (MILPO) to the Personnel Records Division.

Current Materials of Interest

Articles

Charles W. Sherrer and Brian P. Morrison, "DoD Procurement: The State of the Art of Recommendations," 12 National Contract Management Quarterly Journal 42 (1978).

Major Benjamin A. Sims, "Soviet Military Law: Judicial and Nonjudicial Punishment" 13 New Eng. L. Rev. 381 (1978).

Major Daniel J. Gallington, USAF, "The Challenge of Directing A Professional Staff: Leadership and Management Insights For The Staff Judge Advocate" 20 A.F.L. Rev. 1 (1978).

Captain Richard R. James, USAF, "Pleadings and Practice Under *United States v. Alef*" 20 A.F.L. Rev. 22 (1978).

Captain P. G. C. Coulter, USMC, "Three Strikes: Is the Union Out?" 62 Marine Corps Gazette 22 (August 1978).

By Order of the Secretary of the Army:

BERNARD W. ROGERS
General, United States Army
Chief of Staff

Official:

J. C. PENNINGTON
Brigadier General, United States Army
The Adjutant General

• U.S. GOVERNMENT PRINTING OFFICE: 1978